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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1593

PROVISION HOUSE WORKERS UNION LOCAL 274, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

URBAN PATMAN, INC.,

Intervenor.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

LIONEL RICHMAN,
IVAN J. POTTS,
1336 Wilshire Boulevard,
Los Angeles, Calif. 90017,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Provision House Workers Union Local 274, AFL-CIO (the Union), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on April 9, 1974 (*infra*, pp. 1-2).

OPINIONS BELOW.

The opinion of the Court of Appeals is not yet officially reported but is reported at 85 LRRM 2769 (*infra* pp. 1-45). The opinion of the National Labor Relations Board is reported at 197 NLRB No. 150, 80 LRRM 1481 (*infra*, pp. 1-45).

JURISDICTION.

Jurisdiction of this Court rests on 28 USC § 1254 (1). Judgment of the Court of Appeals was entered on April 9, 1974 (*infra*, pp. 1-2).

QUESTIONS PRESENTED.

1. Did the National Labor Relations Board exceed its jurisdiction when it required parties to arbitrate statutory rights which Congress has required the National Labor Relations Board to vindicate?

2. Is the public's interest in the enforcement of the Act degraded by leaving such enforcement to private remedies?

3. Has the National Labor Relations Board abused its discretion in declining to decide the issues in this case and requiring litigation before a private tribunal which was not clearly and plainly authorized by the parties to hear and resolve violations of the Act?

4. Has the National Labor Relations Board abused its discretion in declining to decide the issues in this case and requiring litigation of unfair labor practice charges before a private tribunal which lacks the jurisdiction or special competence of the Board to vindicate statutory rights?

5. Has the National Labor Relations Board abused its power by not establishing appropriate standards by which deferral of violations of the Act may be deferred to arbitration?

6. May the National Labor Relations Board, for internal fiscal reasons, refuse to hear and decide unfair labor practice cases when the activities of the employer meet the Board's uniformly applied standards for exercise of jurisdiction by the Board?

STATUTORY PROVISIONS INVOLVED.

29 U.S.C. 158—Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer

(1) To interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 157 of this Title;

* * *

(5) To refuse to bargain collectively with the representative of his employees, subject to the provisions of Section 159(a) of this Title.

STATEMENT.

I.

The Board's Findings of Fact.

The Intervenor (Employer) in 1968 started what gradually developed into a precooked foods department. Whereas the Employer started it on an experimental basis, it enlarged and improved the machinery and capacity. In 1969, Employer installed, at a substantial cost, a mechanical system with increased capacity.

During 1969 and 1970, Employer's sausage business declined. As sausage department employees would be laid off, the Employer would, if there was room, offer them jobs in the precooked foods department. By May, 1971, there were only 13 employees in the sausage department, but at peak production there were 44 employees in the precooked foods department. The record does not show what proportion of these started in the sausage department and what proportion was hired from outside.

From the start of the precooked foods department, although neither the prior or existing union contracts specifically mentioned in the precooked foods department, Employer paid the employees in the latter department at a rate for each job most nearly equal in function to that under the sausage industry agreement. Donald Patman, Employer's treasurer and manager of the precooked foods department, testified that job functions and skills in the precooked foods department were different from those in the sausage department, but there was a similarity, and many of the jobs in the precooked foods department could be described with the same titles as those in the sausage department. Under the Union's Independent Sausage contract, the wage rates were determined by assigning "bracket numbers" to each job and then listing rates of pay for each bracket number. The wage rates for employees in the precooked foods department were fixed by the Employer on the basis of comparable jobs found in the sausage contract. For example, meat grinders in the precooked foods department (although the job might entail somewhat different functions) were paid at a bracket rate such as meat grinders would receive in the sausage department. For jobs in the precooked foods department that had no equivalent in the sausage department, such as quality control inspection and packing and boxing of precooked foods, rates were unilaterally set by the Employer by assigning bracket numbers to those jobs and paying the rate for such bracket as was listed in the sausage contract.

In August, September, and October of 1970, the Union and Meat Jobbers (an employer's association of which the Employer was a member and which contract covered the majority of Employer's employees) engaged

in negotiations for a new meat cutters contract, a contract different from the one in question.

Employer's attorney, Kenneth Simon, represented the Meat Jobbers. During this period, having some information that its competitors were able to underbid it because they had lower wage rates, Employer requested Simon to discuss with the representatives of the Union the need for negotiating a special set of rates and fringe benefits for employees in the precooked foods department during negotiations of the sausage contract, which were also then in progress. When Simon mentioned to union representatives the need for a consideration of separate rates for the employees in the precooked foods department, he was told that there would be no discussion of that matter because there were more important items on the bargaining table.

The Union and the Independent Sausage Kitchens reached agreement on a new contract in November 1970, and the union membership, which included employees of Employer, ratified that agreement on November 28.

Employer learned of the ratification of the sausage industry agreement in early December 1970. Although Employer had not been involved in its negotiations and although the Meat Jobbers had not yet signed that agreement on behalf of Employer, as it had been accustomed to do, and although the agreement did not contain rates for certain of the job titles in the precooked foods department, the Employer, nevertheless, in December, 1970, gave wage increases retroactively (as called for by the sausage agreement) as well as other benefits called for by that agreement not only to its employees in the sausage department but also to those in its precooked foods department.

Later in March, when union officers were visiting Employer's plant, President Patman requested that they come to his office. When they were there, Patman told them what he had learned about the rates under contracts which competitors had with various labor organizations. He told them that he had $500,000 in equipment for the precooked foods operation that would have to stay idle unless he could get a contract that was equal to that of his competitors. Union President Zaharis said that they understood the Employer's problem. He told Patman that the Union would find it difficult to tell the workers that they would have to take a cut in pay and fringe benefits, but said that he would take the problem to Cook, the executive secretary for the Union, and ask him to schedule a meeting with Patman.

Cook arranged such a meeting in late April, and, pursuant to such arrangement, Cook and Zaharis met with President Patman. Patman told the Union representatives that it was economically impossible to exist on a total package of $5.05 (including fringe benefits), which he was paying, as against $2.48 paid for the same thing by his competitors. Cook said that he sympathized with Patman but that he had no authority to change the existing contract.

The Employer has an annual layoff in June, since the bulk of the sales from the precooked department were sold to the Los Angeles City Schools. Even earlier than June, production had fallen off in the precooked foods department to a point where it was necessary to lay off the second and third shift employees. The first

shift employees were laid off at the end of the day on Friday, May 28.

During the day of June 2, Simon met with union representatives Zaharis and Murillo and presented a proposal agreement based on rates and fringe benefits contained in the agreements of competitors.

That evening the three representatives of the Union met with the 21 laid-off employees who had attended. Cook told the employees that the Employer, because of competition, was desirous of operating at the rates which had been submitted to the Union that day. He told them that, if the Employer could not meet the competition, it would have to close that department. Upon being questioned by an employee about whether or not they did not already have a contract, Cook told them that they had. When the matter was put to a vote, the employees voted against accepting the Employer's proposal. Later, Cook telephoned Simon and informed him of the vote. Simon's only comment was, "We have a problem."

On June 3, Simon spoke with Lionel Richman, the Union's attorney, and explained the Employer's problem and the employees' rejection of the Employer's proposal. On that day and thereafter for a couple of weeks, Simon and Richman discussed various courses that the parties might take to solve the Employer's problem, without which, it was believed, the Employer could not reopen its precooked foods operation.

A proposal by Simon for an "advised" arbitration was, for a time taken under consideration but was ul-

timately rejected by Richman. In his talks with Richman, Simon had advanced the argument that, as to the employees in the precooked foods department, there was no contract, so Richman suggested that, if Simon thought he could sustain his theory that there was no contract, Richman would file a charge of violation of Section 8(a)(5) of the Act and, if the Regional Director should find that there was no contract in existence and would refuse to issue a complaint, Richman would accept his decision without appeal, and he could then tell the Union that there was no contract. As appears, the Union filed the charge in this case on June 24, 1971. However, the Regional Director did not dismiss the charge. Subsequently (August 31, 1971), a complaint was issued.

Simon thereupon drafted a letter, dated June 22, and addressed it to the precooked food employees last laid off, telling them that the annual layoff, which began on May 31, would end on June 25, but that, because the Employer was losing money in the operation, it could reopen only with employee wages and benefits which did not cost more than its competitors were paying. The letter continued by setting out the wages and fringe benefits that precooked food employees would receive after June 28. These were the same as those which had been presented to the Union on June 2 and had been rejected by the employees that night.

On June 28, approximately 17 of the 19 employees recalled returned to work. The remaining two vacancies

were filled by calling the next seniormost employees. The wages, economic benefits, and other conditions of employment outlined in the June 22 letter were instituted and were continued thereafter. They were still in effect at the date of the hearing. Virtually all of these wages and conditions are less than those listed in the contract between the Union and the Independent Sausage Kitchens of Los Angeles—less than 50 percent in some cases and close to 50 percent for others.

The independent sausage contract contained a grievance and arbitration clause which provides, in relevant part, as follows:

> "1. No employee shall be discriminated against by reason of his activities in, or his representation of, the Union.
>
> 2. No employee covered by this Agreement shall be demoted, suspended, dismissed or otherwise disciplined without just and sufficient cause. Should any action by an Employer cause an employee covered by this Agreement to become aggrieved, such employee shall orally or in writing make his complaint to the Union. Thereupon, a representative of the Union and the representative of the affected Employer shall promptly begin an investigation of the grievance raised by the complaining employee, which shall be initiated by the Union's directing a letter to the affected Employer requesting him to designate his investigating representative. The parties agree that their investigating representative shall have ten (10) calendar days following the Employer's receipt of the letter mentioned immediately above, within which to complete their investigation of the grieving employee's complaint.

3. In order that the Union may be aware of any alleged violation of an Employer rule not in conflict with this Agreement, and be given an opportunity to help correct violations and aid in maintaining maximum efficiency, it is agreed that where the Employer finds it necessary to reprimand an employee, the Employer shall reduce such reprimand in writing in triplicate, giving one copy to said employee, one to be mailed to the Union immediately, and one to be retained in the Employer's files. Written reprimand shall be void after one-hundred and eighty (180) calendar days.

Upon the issuance of a third notice or in a situation where immediate disciplinary action is contemplated, the management may request the employee to report to the office where the employee shall state in writing if a hearing is desired and shall thereupon leave the premises in an orderly fashion and without delay. If a hearing is not requested the employee must file his complaint with the Union within three (3) working days. If the employee fails to do so, the employee, in case discharge is the penalty, shall have no further claim.

4. In the event the parties are unable to resolve any dispute through the grievance procedure set forth in Section 2 hereof, either party may demand that the dispute proceed to arbitration. Such demand for arbitration must be made in writing within thirty (30) days from the completion of the

ten (10) calendar day investigating period set forth in Section 2.

Either party may request the Federal Mediation and Conciliation Service to supply a list of seven (7) proposed arbitrators. Each party alternately shall strike one name from the list and the final name remaining shall be selected as the arbitrator.

All costs of arbitration shall be borne equally between the parties.

5. The findings of the arbitrator shall be binding upon both the Union and the Employer providing, however, that the arbitrator shall not have the authority to change, alter or modify any of the terms or provisions of this Agreement.

No controversy regarding hours or wages shall be subject to arbitration hereunder and the provisions of this Article shall not in any way interfere with the right of any party to seek relief at law, in equity, or before any administrative tribunal where a controversy regarding hours or wages exists. (Emphasis added.)

Grievances involving wages or other money cost to the Employer must be filed promptly after the cause or event giving rise to the grievance, and such wages or money claims will not be valid and collectible for a period earlier than one (1) year prior to the date of the filing of the grievance or complaint with the Employer."

II.

The Board's Conclusions and Order.

The Board found that the dispute was arguably one of whether the contract covered the precooked food department employees and not one of wages; that the arbitrability of such dispute is properly determinable by an arbitrator. Therefore, the panel majority ruled that the Board should defer to arbitration and dismissed the complaint, retaining jurisdiction only to review the arbitration result.

III.

The Decision of the Court of Appeals.

The Court of Appeals, in agreement with the Board, affirmed its conclusion that it was not in excess of the Board's jurisdiction nor did it abuse its jurisdiction in disregarding the conclusions of its Administrative Law Judge and ordering the cause deferred to arbitration. While Petitioner contended, the Administrative Law Judge concluded and even the Board itself found that the question of whether or not a contract existed, covering the employees in question, the Board found that the existence of the contract itself was an appropriate subject of arbitration. In affirming, the Court of Appeals noted that "the characterization of the dispute as one involving interpretation of a contract, rather than existence of the contract, is not wholly free from doubt, we cannot say that the Board abused its discretion in concluding that contract interpretation was the gravamen of the dispute."

REASONS FOR GRANTING THE WRIT.

The problems here presented represent a magnification of the problem presented in *NLRB v. Wyman-Gordon,* (1969) 394 U.S. 759, the Board's obdurate refusal to comply with the requirements that the Administrative Procedure Act prescribes for rule making, 5 U.S.C. 553. While this Court unanimously reprimanded the Board for its practice of playing fast and loose with the rule-making procedure, as the National Labor Relations Board likes to do (per Douglas, J. at p. 779), nevertheless, a majority upheld the Board, with the obvious consequences. No suitor minds having his wrist slapped, so long as he prevails in his suit. As a result, the doctrine of deferral to arbitration was born by a divided Board in *Collyer Insulated Wire,* 192 NLRB No. 150, 77 LRRM 1931, and has been applied wholesale since by the Board to evade its obligation to hear and decide charges of violation of federal law. From case to case, the basis for deferral has changed, with rules being added to, subtracted from and altered to meet the Board's primary goal, disposing of its decision-making obligations. While *Wyman Gordon, supra,* was purely procedural, *Collyer, supra,* and its progeny were totally substantive.

At oral argument before the Circuit, counsel for the Board freely conceded that *post-Collyer* decisions "went all over the lot" but sought refuge in the admirable attempts of the General Counsel to codify these *Collyer*-type decisions, as they emerged, to guide litigants as to the past, but leaving them blind as to the future.

Even the Court of Appeals conceded that: "Of course, the Board cannot abdicate its statutory responsibilities by inappropriate deferrals to arbitration." However, we are not aided by any hint as to what would be "inappropriate deferrals to arbitration." The Circuit does not tell us; neither does the Board.

For example, in almost identical circumstances of unilateral withdrawal of contract recognition wherein the employer told . . . ". . . employees that it would hire new employees at less than contract rates," the Board held deferral not appropriate. In affirming, the Seventh Circuit said:

"Here, there is no claim that the company believed it had a right under the agreement to unilaterally reduce wages but rather involves, as the Board found, 'Respondent's complete rejection of the principles of collective bargaining. . . .' Thus the company is not entitled to submit the matter of back pay to arbitration under either the provisions of the Act or the policy of the Board." *NLRB v. Chase Mfg. Co.*, (Feb. 5, 1974) .... F.2d ...., 85 LRRM 2602.

The District of Columbia Circuit upheld the Board's deferral decision but added:

"Our endorsement of the Collyer rule would be incomplete without one further comment. While the Board's promise to overrule arbitration awards which are irregular or repugnant to the Act is a necessary condition to the legality of pre-arbitral deferrals, it is not a sufficient one. Put another way, the fact that any ultimate award must conform to the policies of the Act does not guarantee that deferral itself is consistent with the Act. Pre-arbitral deferral might constitute an

effective denial of any remedy if, for example, arbitration of the dispute would impose an undue financial burden upon one of the parties. Dismissal of the complaint in such a case would be contrary to the policies of the Act although all other criteria for application of the Collyer doctrine are met. Deferral might also be unjustified where it prevents an orderly exposition of the law in question. Successive arbitration awards could produce a variety of ad hoc solutions to the same problem, all consistent with the Act, but no uniform rule. In such circumstances further abstention by the Board might be contrary to Federal labor policy." *Local Union No. 2188, IBEW v. NLRB,* (Feb. 28, 1974) .... F.2d ...., 85 LRRM 2576.

Finally, in *Enterprise Publishing v. NLRB,* (March 8, 1974) (CA 1) .... F.2d ...., 85 LRRM 2746, deferral is upheld even though the interests of the Union are hostile to the employees involved on the novel theory that the Employer, being hostile to the Union, could be depended on to defend the rights of the employees in an arbitration caught between a war of leviathans, with the employees being caught in between.

Thus, each case contains a *caveat* limiting Board discretion and each *caveat* is different, leaving the Board free to manufacture differing *ad hoc* standards, in each case by a split Board.

This Court should grant certiorari in this case to review the issues here presented and, if deferral to arbitration is to be approved as established Board doctrine, establish the guidelines by which that doctrine is to be invoked.

ARGUMENT.

I.

"Collyer and Its Progeny".*

As a general rule, the Board has the statutory obligation to resolve unfair labor practice charges in matters touching upon contract interpretation and is not ousted from jurisdiction by contract grievance machinery or other forms of private dispute settlement. Under its *Spielberg* policy, however, the Board defers to arbitration awards rendered in proceedings to which *all* parties have acquiesced, provided the proceedings were fair and regular on their face and the results were not repugnant to the purposes and policies of the Act. *Spielberg Manufacturing Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955).

Spielberg Manufacturing Co., 112 NLRB 1080, which is the launching pad for *Collyer*, involved a grievance over the discharge of employees where all the parties had agreed to submit the dispute to arbitration and the charge was filed solely to overturn the award of the arbitrator.

In 1971, the Board, led by Chairman Miller, announced a major policy reversal in *Collyer Insulated Wire*, 192 NLRB No. 150, 77 LRRM 1931. Under *Collyer*, the Board will dismiss charges where arbitration machinery is available to the parties even though an award has not yet been rendered, and even where arbitration proceedings have not been instituted; the Board will, however, retain jurisdiction to ensure compliance with its *Spielberg* rules of an eventual arbitra-

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*(Dissent) *Medical Manors, Inc.*, October 19, 1972, 199 NLRB No. 139.

tion award. The *Collyer* decision divided the Board 3 to 2.

In *Collyer*, the labor agreement between the employer and the union contained a grievance arbitration procedure and a no strike, no lockout clause. The employer during the term of the agreement made certain wage rate changes. The union alleged that the unilateral changes were a violation of the employer's bargaining obligation under Section 8(a)(5) of the Act. The employer contended that the changes were permissible under the agreement. The majority stated that "this dispute is essentially a dispute over the terms and meaning of the contract between the union and the respondent." The Board then held that the dispute should be resolved pursuant to the contract and deferred to the grievance arbitration machinery. The Board did, however, retain jurisdiction over the issue in the event that the matter was not submitted promptly to arbitration or the arbitration procedures were not fair or regular or the result was repugnant to the Act.

The Board in *Collyer* did not define with any precision the scope of its new deferral policy. Therefore, the circumstances upon which the Board relied in *Collyer* must be examined closely. The Board, influenced by the contractual nature of the dispute, said: "The contract and its meaning in the present circumstances lie at the center of the dispute. In contrast, the Act and its policies become involved only if it is determined that the agreement between the parties, examined in the light of its negotiating history and practices thereunder, did not sanction respondent's right to make the disputed changes. . . ."

The Board also referred to the following factors:

1. There was no enmity by the employer to the employees' exercise of their statutory rights;
2. The employer was willing to arbitrate the dispute; and
3. There was long and productive bargaining relationship in which the parties had "mutually and voluntarily resolved the conflicts which inhere in collective bargaining."

While members Fanning and Jenkins continue regularly to dissent, member Penello has clearly joined with member Kennedy and Chairman Miller in applying the basic principles of the *Collyer* case. Since the addition of Penello, several cases of the same general nature as *Collyer*, where the complaint alleged that the employer's unilateral action was in violation of the statute, but where such action, if taken, would also arguably have constituted a violation of the contract, have been deferred.

In the following cases, the Board has referred the parties back to their grievance and arbitration machinery, reserving jurisdiction for the limited purpose specified in *Collyer:* Thus in *Peerless Pressed Metal Corp.*, 198 NLRB No. 5, the Board deferred to a situation where the union contended that the employer had instituted a new incentive system and where the employer contended that the negotiations between the parties contemplated that such a system might be instituted without the necessity of bargaining. And in *Southwestern Bell Telephone Co.*, 198 NLRB No. 6, the Board again deferred to a dispute involving an employer's greater utilization of part-time personnel,

which the union contended would destroy the seniority provisions of the agreement, but where the employer contended that the agreement intended flexibility in the use of part-time employees. In *National Radio Co.*, 198 NLRB No. 1, the Board took the next step and deferred in an 8(a)(3) case pursuant to the *Collyer* decision even though no arbitration decision had yet issued, but where grievance and arbitration machinery was available to resolve the dispute. The facts there, very briefly, involved the discharge of the union representative for failing to notify his supervisor when he was going to another part of the company premises on a grievance matter. The company contended that the requirement of reporting to the foreman was a reasonable plant rule, whereas the union contended that it was violative of a clause in the contract which permitted free movement within the plant area of stewards and local union officials and certain members of the grievance committee. A grievance was filed over the discharge and was on its way to arbitration when the arbitrator, learning of the charges which were filed with the Board, advised the parties that he would not issue his decision until after the Board had acted in the case. The Board pointed out that although the case did not necessarily involve an ambiguous or contested contract provision there could be no question but that the discharge was arbitral under the just clause provision of the agreement. The Board said:

> "We may assume that the union will be aware of its institutional interest in protecting its officer and leading proponent against discipline which is thought to restrict his activities on the union's behalf. In that respect, especially, it must be noted that the interest of the employee and his repre-

> sentative are in substantial harmony in this case and are likely to be so in every such case. It is sufficient to note here that in protecting O'Connell the union protects itself as well and, for that reason, we see no ground to assume that O'Connell's interest would be inadequately represented under the contractual procedures."

Chairman Miller stated on September 12, 1972, that

> "our abstention at this point in the procedures could not be equated with 'abdication' since as in *Collyer* we reserve jurisdiction and thus preserve the right of the charging party 'to seek from us vindication of statutory rights should the arbitration reach a result not tolerable under the statute.' "

Here again the dissent was a heated one charging that the Board eliminated the protection of the Act by its "subcontracting of such cases to arbitration" and asserting that the Board was "removing the protection of the Act from a large segment of those it was designed to protect."

In another 8(a)(3) case, *Appalachian Power Co.*, 198 NLRB No. 7, the Board also deferred to arbitration when the dispute between the parties involved the issue of whether an employee on union leave of absence had violated the terms of his leave by engaging in certain organizational activity during the leave, it being the company's contention that such activity was contrary to the expressed terms of the leave, which provided that it was for the purpose of performing activities serving "the interest of the bargaining units."

The Board issued the text of a speech given on September 12, 1972, before the Industrial Relations Research Association of Oakland, California, by Chairman Edward B. Miller, who stated

> "Nor do we yet know whether our policy will be successful in terms of the parties' ability to resolve their disputes successfully, fairly, and in a manner not repugnant to our statute, through the use of their own procedures. We have, as I have said, reserved jurisdiction so that we may take a second look at any case in which those proceedings go awry. A regular pattern of such failures would, of course, compel our *Collyer* majority to take a second look at the whole issue."

Moreover, Chairman Miller stated

> "If there is one thing which all of you who work in this field know, it is that if our system of free collective bargaining is to survive it is vital that such disputes be settled promptly and without long and legalistic litigation. *Collyer* was decided in the knowledge and conviction that grievance and arbitration procedures have, by and large, proved to be a successful means to this end. Yet, as I said a year ago at Pebble Beach, we know that those procedures too are showing a tendency to become more legalistic and more prolonged. If our *Collyer* policy is to remain viable, then the parties themselves must be alert to the need to monitor and improve those procedures so that they do not become a trap for the unwary, rather than a quick means of solving mutual problems. But at least in the area of grievance procedure and arbitration, the freedom to improve those

procedures is vested in the parties. That is not the case with the National Labor Relations Board. Our procedures for dispute resolution are too often too long, too tentative and too ineffective. They are in a very real need of streamlining, improvement, and modernization. But here, unlike the grievance-arbitration area, the route to improvement is cumbersome. *The defects in our procedures are statutory. The changes, the reforms, therefore must come from Congress.*" (Emphasis supplied.)

II.

The Board Exceeds Its Jurisdiction When It Compels Parties to Arbitrate Statutory Rights.

The principle that a ministerial agent of the United States government must carry out the mandate of Congress is neither novel nor of recent origin—it has existed since the birth of the Republic.

> *Marbury v. Madison,* 1 Cranch 137, 157-158, 182.

Section 10(a) of the Act (29 U.S.C. 160(a)), makes clear that the Board's power to prevent unfair labor practices is not . . . ". . . affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ."

Thereafter, the section spells out the sole statutory basis for ceding jurisdiction, and that basis is exclusively (1) to a State or Territorial agency, and (2) on jurisdictional basis only.

In other words, Congress only gave the Board limited power to alleviate the "no man's land" created by its

declination to assert jurisdiction based on budgetary considerations.

> Vol. II, Legislative History of the Labor Management Reporting and Disclosures Act of 1959, pages 107(3)-108(1).

It did not give the Board general authority to subcontract out its statutory duty to hear and decide unfair labor practice charges, and especially in cases involving representation.

One would assume that the Board's regional directors would have greater expertise in applying the Act than an arbitrator, yet the comments of Judge Kaufman, speaking for the Second Circuit, on the Board's subdelegation to them in unfair labor practice cases, is particularly relevant.

> "The very fact that the Board has great discretion in making judgments, cf. Garner v. Teamsters Local 776, 364 U.S. 485, 490, especially in representation matters, NLRB v. A. J. Tower Co., 329 U.S. 324, 330 (1946), indicates a legislative purpose to confer final authority in these situations on the Board itself—not a subdelegatee. As another court has remarked, 'While we recognize the considerable discretion with which the Board has been entrusted, it is proper to observe that with discretion goes responsibility.' NLRB v. Bonnie Enterprises, 341 F 2d 712, 714 (4th Cir. 1965) (dictum). In an unfair practice proceeding, the Board cannot completely abdicate its responsibility to a regional director, a functionary whose ap-

pointment is not even subject to consideration by the Senate, as are those of the Board members.[5]

Moreover, the Board's experience is particularly relevant and desirable in deciding complex issues relating to the appropriate bargaining unit before the potent sanctions arising from the finding of an unfair labor practice are invoked. See NLRB v. Jones & Laughlin Steel Corp., 331 U.S. 416, 20 LRRM 2115 (1946); Packard Motor Car Co. v. NLRB, 330 U.S. 485, 19 LRRM 2397 (1947)."

Pepsi Cola Buffalo Bottling Co. v. NLRB, (CA 2 1969) 409 F.2d 676; cert. den. 396 U.S. 904.

Similarly, if we substitute "Board" for "Regional Director", the Ninth Circuit's statement in *Retail Clerks Unions v. Food Employers Council,* 351 F.2d 525 is particularly apropos:

> "It is not for the Regional Director to substitute his own ideas of how best to deal with alleged unfair labor practices for those of the Congress."

Similar statements have been made by various circuits on occasions when the Board has attempted to disregard its obligation to perform the functions set forth in the Act and mandated by Congress. As the Fifth Circuit has tartly pointed out a number of occasions, the Board

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"[5]'[A]nother risk is that subordinates will be less competent than agency heads, particularly where the superiors have been selected for their expertise in a certain field. In such a situation private parties have a strong claim to the personal attention of the agency heads.' Note, Subdelegation by Federal Administrative Agencies, 12 Stan. L. Rev. 808, 812 (1960). Cf. Porter v. Roach, 69 F.Supp. 56 (D. Ore. 1946)."

cannot, by administrative fiat shirk an obligation which has been placed upon it by Congress.

Surratt v. NLRB, (CA 5, 6-20-72) 80 LRRM 2804;

Templeton v. Dixie Color Printing, (CA 5) 444 F.2d 1064, 77 LRRM 2392.

The problem involved in the instant case concerns itself with one of the most sensitive areas of the Act, that is, representation. As the Board itself notes in its decision in this case:

> ". . . this dispute is arguably one of whether the contract covers the pre-cooked food department employees, and not one of wages."

In other words, the issue is not a dispute over the application of the contract, but whether the Union even represents the group in question or, if the Union does represent them, are they part of an established bargaining unit covered by collective bargaining agreement. Unit questions are obviously questions which the Board must resolve. They have been told this not only by the Ninth Circuit, but by the Second Circuit.

The Board has been cautioned that in cases involving accretion to a unit, the obligation of the Board to exercise its formal functions is clear.

Westinghouse Corp. v. NLRB, (CA 2, 1971) 440 F.2d 7, cert. den. 404 U.S. 853;

NLRB v. Masters Like Success Inc., (CA 2) 287 F.2d 35;

NLRB v. Retail Clerks 770, (CA 9) 399 F.2d 501.

Similarly, the distinction between the waiver of specific rights has been recognized by the Second Circuit, with the written agreement to arbitrate being given greater deference in the former case.

Lodge 743 v. United Aircraft, 337 F.2d 5; cert. den. 12 L.ed.2d 797.

In some circumstances, the authority of the Board and the law of contract are overlapping, concurrent regimes, neither preempting the other.

The Board is expressly invited by the Act to determine whether an employer has refused to bargain in good faith and thereby violated 8(a)(5). It is appropriate, then, for the Board to exercise its jurisdiction.

NLRB v. Strong, 393 U.S. 357, 361.

The Board cannot disregard the duty to hear and determine when that duty is placed upon the Board by statute.

NLRB v. Radio Engineers, 364 U.S. 573.

Where Congress intended to permit the Board to defer to arbitration, Congress took great pains to say so. One may assume that if Congress had the knowledge, expertise and intent to permit the Board general authority to defer to arbitration, it would have done so. It is classical statutory construction that a statement of one thing excludes all others.

The sole exception to the statutory duty to "hear and determine" in favor of private settlements is contained in 10(k). Even there, however, the independent right to seek Board relief under 9(c)(1) is recognized.

Carey v. Westinghouse, 375 U.S. 261, 267.

Equally important is the fact that the arbitration clause is in no way designed to resolve the instant dis-

pute. Again, as the Board has noted, the dispute is whether the contract covers a unit of employees. That dispute can in no way be resolved under the agreement since it calls for unit clarification, a specific function of the Board. In order to make this issue arbitrable, it would be necessary that the charging party voluntarily (or involuntarily, in the face of the Board's order) enter into a specific writing agreement to arbitrate an issue which is not otherwise arbitrable. In other words, the charging party is now compelled to enter into a contract which it has never entered into containing terms which are anathema to it and unless it does this it can receive no consideration by the Board.

The Board's demand that the charging party enter into an agreement with the employer to arbitrate either whether or not there is a contract between the parties covering the unit in question, or whether new and different rates should be written into the contract for these employees is substantially beyond the Board's jurisdiction.

It has been established beyond cavil that the Board lacks the authority to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement.

H. K. Porter Co. v. NLRB, 397 U.S. 99, 102; 25 L.ed.2d 146, 150.

> "The object of this Act was not to allow governmental regulations of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of

prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement."

H. K. Porter Co. v. NLRB, supra, at pages 103-104; 25 L.ed.2d 151.

III.

The Public's Interest in the Enforcement of the Act Is Degraded by Leaving That Enforcement to Private Remedies.

The Board has apparently lost sight of a principle which has been stated with some regularity. The Act is not designed as a private treaty between employers, on one hand, and unions, on the other. As a matter of fact, the heart of the Act is contained in Sections 1 and 7 of the Act. Section 1, the Statement of Findings and Policies, tells us that the denial by some employers of the right of *employees* to organize leads to strike and other forms of industrial strife.

The inequality of bargaining power between *employees* who do not possess full freedom of association or actual liberty of contract and employers . . . substantially burdens and affects the flow of commerce.

"Experience has proved that protection by law of the right of *employees* to organize and bargain collectively safeguards commerce. . . ."

Section 7, the magna carta of employees, states that "*employees* shall have the right to self-organiza-

> tion, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activity . . ."

There are no "union" rights under the Act. There are no "employer" rights under the Act. The entire thrust of the Act is aimed at protecting the employee from intimidation and oppression either by his employer or by a union.

The public interest in seeing that this occurs is inherent in the Act because, as Congress has noted, if the employees are protected in these rights, then there will be a radical diminution in industrial strife and a minimum interruption of the free flow of goods in commerce.

It is not only possible but entirely probable that on numerous occasions union vested interests may be inconsistent with the interests of one small group of employees.

For example, in the instant case, the record reflects that the unit in question makes up a very small part of the overall bargaining unit represented by the Union. The testimony of Mr. Patman reflects a fear that because of the wage rates required to be paid to the employees in the small unit in question, there might be financial impact upon the entire business operation. Clearly, at this point, the Union is faced with an internal dilemma. Can it totally and wholeheartedly press the claim of 20 or 30 people to total and absolute

success if the result will be to close down a plant and lose the jobs of a hundred or a hundred-fifty people?

The evidence before the Trial Examiner and before the Board clearly spells out this dilemma.

Jim Zaharis, the Union President, told Patman that his problem in competing with other companies in the cooked food area was one for which he had sympathy —"Mr. Patman, you are not falling on deaf ears." Cook said that he sympathized with Patman, but that he had no authority to change the existing contract. The Union discussed having different wage rates for classifications of employees performing the same work. Counsel for both the company and the Union discussed "advised" arbitration as a method of resolving the dispute and it took five days of soul searching before the Union rejected the suggestion.

This possibility was discussed even after the employees had considered the proposed reduction in wages and they had voted it down.

Even the ultimate suggestion by counsel for the Union that if a charge of violation of Section 8(a)(5) of the Act was filed by the Union and dismissed by the Regional Director, no appeal would be taken, indicates the necessarily ambivalent position which the Untion and its attorney were required to take in considering the conflicting interests of a small group of employees whom they believed to be covered by a contract, as against the practical impact upon the Employer if he continued to pay a rate of pay in excess of his competitors and thus imperiled the jobs of all of that employer's employees.

In the light of all of these facts, can there be any assurance that the Union will be able to consciously

close its eyes to the impact of a successful arbitration on some 150 or 200 employees who might lose their jobs?

The act does not require that the minority of employees risk the results of this dilemma. The unfair labor practice charge is a matter of public concern and under Section 7 of the Act, the employees whose status is in question are entitled to the independent protection of the Board.

As one of the many violent dissenting opinions reflects, the ultimate result of the application of the *Collyer* doctrine is to reduce section 8(a) of the Act to the most limited protection of all, the protection of the contractual right to arbitrate.

The best commentary appears in the dissent in *Joseph T. Ryerson & Sons, Inc., infra.*

> "Collyer and subsequent decisions have drastically reduced the statutory protection against unilateral repudiation, abrogation, or modification of collective bargaining agreements, and the final elimination of this protection seems to us the logical and inevitable result of the majority's reasoning. In the present case and in the National Radio, supra, the majority has begun to replace with arbitration the statutory protection afforded by Section 8(a)(1) and (3), and their elimination from the protection of the Act, as in the case of unilateral changes, can hardly be long delayed. In what we consider the inevitable march of Collyer toward the elimination of Section 8(a) from the Act, our colleagues will bestir themselves only to protect the purely contractual right to arbitrate. The upshot is, of course, that contract

rights—as contained in and limited by the contract—have superseded, displaced, and indeed nullified the statutory protection. The majority's willingness to permit the arbitrator to determine which issues are arbitrable, and to what extent, only emphasizes the majority's destruction of the statutory protection.

"We await with interest the next unfoldings of the Collyer principle, which almost certainly, in those cases where the parties choose to include an arbitration provision, will eliminate Section 8 (a) of the Act and substitute arbitration for it. The statute will then operate only to protect access to the arbitration process—and perhaps not even that, as the deferral to arbitration of the first alleged violation here demonstrates.

"We cannot follow this downward and widening spiral of the 'fundamental soundness' of Collyer, resulting in an ever-increasing destruction of the statutory protection of employees. As we pointed out in our dissent in National Radio, supra, Congress in enacting this statute explicitly disapproved precisely the same course of deferral the majority has now adopted,[13] because of the public interest in proper and uniform interpretation of the Act. We perceive no authority in the Board, and no reason apart from authority, to override this action of the Congress. When this case, and others like it, are brought to the Board, the Board is obliged and required to determine them on the merits, and we would do so."

Joseph T. Ryerson & Sons, Inc., (Oct. 2, 1972) 199 NLRB No. 44 (Dissent).

Footnote 13 in the *Ryerson* decision is particularly important since the dissent points out that the entire premise of the *Collyer* decision was originally suggested by Senator Wagner, the draftsman of the original National Labor Relations Act, but was specifically rejected by Congress.

> "[13]As we there said:
>
> 'Since the original enactment of this statute in 1935, it has been contemplated that the Government, with its resources, facilities, and power, shall vindicate the rights protected by the Act. "No private right of action is contemplated. Essentially the unfair labor practices listed are matters of public concern, by their nature and consequence, present and potential. . . ." See II Leg. Hist. 2931, 2978, 3074 (1935). The original Section 10(b) proposed by Senator Wagner, "father" of the statute, contained a clause providing that the "Board may, in its discretion, defer its exercise of jurisdiction over any such unfair labor practice in any case where there is another means of prevention provided for by agreement. . . ." See I Leg. Hist. 1301 (1935); II Leg. Hist. 2430 (1935). This is exactly what the majority does in this case. Yet this provision was struck from the bill. II Leg. Hist. 2351 (1935). A clear rejection of the "policy" which the majority here and in Collyer have created.' "

The Board itself, in one of its *ad hoc* permutations of the rules, held in *Kansas Meat Packers,* 198 NLRB No. 2, 90 LRRM 1743:

> "In our opinion, it would not be consonant with statutory policy to defer to arbitration in this

instance as the interests of the Charging Parties —the alleged discriminatees—are in apparent conflict with the interests of the Union and certain of its officials, as well as with the interests of Respondent."

The minority of employees here involved cannot be stripped of their statutory right when it is clear that their rights will not be wholeheartedly protected in an arbitration. Further, it is clear that the issue in this case is not the simple application of a contract term or clause to an act, but rather involves the very question of the existence of the contract, as to these employees. Here, the statutory remedy comes to the fore, since the issues go beyond the common expertise of arbitrators.

As your Honorable Court said in *Alexander v. Gardner-Denver Co.*, (Feb. 19, 1974) .... U.S. ...., 39 L.ed.2d 147, in discussing arbitral rights versus statutory rights under the Civil Rights Act of 1964:

> "Moreover, a contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination. Both rights have legally independent origins and are equally available to the aggrieved employee. This point becomes apparent through consideration of the role of the arbitrator in the system of industrial self-government. As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the 'industrial common law of the shop' and the various needs and

desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties:

> '[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.' United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 US, at 597, 4 L Ed 2d 1424.

If an arbitral decision is based 'solely on the arbitrator's view of the requirements of enacted legislation,' rather than on an interpretation of the collective-bargaining agreement, the arbitrator has 'exceeded the scope of his submission,' and the award will not be enforced. Ibid. Thus the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII."

This Court consider *Spielberg, supra,* (fn. 17) but discarded it as a remedy for statutory rights (39 L.ed.2d at p. 163) saying:

> "This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation."

* * *

"Moreover, the fact-finding process in arbitration usually is not equivalent to judicial fact-finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. See Bernhardt v Polygraphic Co., 350 US 198, 203, 100 L Ed 199, 76 S Ct 273 (1956); Wilko v Swan, 346 US 427, 435-437, 98 L Ed 168, 74 S Ct 182 (1953). And as this Court has recognized, '[a]rbitrators have no obligation to the court to give their reasons for an award.' United Steelworkers of America v Enterprise Wheel & Car Corp., 363 US 593, at 598, 4 L Ed 2d 1424. Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.

It is evident that respondents' proposed rule would not allay these concerns. Nor are we convinced that the solution lies in applying a more demanding deferral standard, such as that adopted by the Fifth Circuit in Rios v Reynolds Metals Co., 467 F2d 54 (1972). As respondent points out, a standard that adequately insured effectuation of Title VII rights in the arbitral forum would

tend to make arbitration a procedurally complex, expensive, and time-consuming process. And judicial enforcement of such a standard would almost require courts to make de novo determinations of the employees' claims. It is uncertain whether any minimal savings in judicial time and expense would justify the risk to vindication of Title VII rights.

A deferral rule also might adversely affect the arbitration system as well as the enforcement scheme of Title VII. Fearing that the arbitral forum cannot adequately protect their rights under Title VII, some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced and the result could well be more litigation, not less.

We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim de novo. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate."

IV.

The Board Has Abused Its Discretion in Declining to Decide the Issues in This Case.

A. The Private Tribunal Lacks the Jurisdiction to Decide the Questions on Which Jurisdiction Is Deferred.

The Labor Board, in its wholesale extension of *Collyer,* has lost sight of the crucial difference between arbitration and mediation. One applies an existing contract to a set of facts; the other modifies, subtracts from or adds to the agreement. One involves interpretation, the other negotiation.

Professor Frank Elkouri has pointed out this basic difference in his standard text on arbitration:

> "The Railway Labor Act of 1926, as amended in 1934, created the National Railroad Adjustment Board, which, upon submission of a complaint by either party, takes jurisdiction over 'disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions * * *' after they have been 'handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes.' On the other hand, disputes concerning 'changes in rates of pay, rules, or working conditions not adjusted by the parties in conference' and 'any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conference are refused' are handled by the National Mediation Board.

"The function of the Adjustment Board is to interpret and apply collective agreements, not to make or modify them. The Mediation Board, on the other hand, is directed to help the parties, through mediation, to reach agreement on the terms of collective agreements and, upon failure to bring about an agreement, to attempt to induce the parties to submit their dispute to voluntary arbitration.

"In 1946, the United States Conciliation Service, in recognition of the important distinction between arbitration of grievances and arbitration of disputes concerning wages and other basic contract terms, announced that thereafter it would be the policy of the Arbitration Division of the Service to bear the distinction in mind when requested by the parties to a dispute to provide assistance in the selection of an arbitrator."

How Arbitration Works, Elkouri.

Whether or not a party has agreed to submit a dispute to arbitration is not a question to be submitted to the arbitrator.

Atkinson v. Sinclair Refining Co., 370 U.S. 238, 8 L.ed.2d 462.

More important, when the very issue of the existence of the contract is in issue, that issue must be determined judicially as a condition precedent to ordering arbitration.

UMW Dist. 22 v. Roncco, (CA 10) 314 F.2d 186;

Wiley & Sons v. Livingston, 376 U.S. 543, 546, 11 L.ed.2d 898, 902-903.

We feel that the Board's findings clearly place the arbitral cart before the judicial horse.

The Board finds, at page 3 of its decision, that the dispute is arguably one of whether the contract covers the precooked food department employees and arbitrability of such dispute is determinable by an arbitrator.

To the contrary, it is submitted that the specific functions which are judicial and not arbitrable are whether there is a contract covering the employees in question and whether the dispute is arbitrable under that contract.

In the instant case, the entire argument is whether or not there is a contract covering the employees in the precooked food department. If there is not such a contract (as the company contends), there is no jurisdiction to arbitrate. To the extent that the Board exercises judicial functions, its obligations under the Act would be no different from the obligations of the court under Section 301 of the Act. It cannot vest jurisdiction in an arbitrator to determine if, in fact, there is a contract.

B. The Private Tribunal Lacks the Competence to Vindicate the Statutory Rights Involved.

If the dispute is one which has traditionally been resolved by the courts, arbitration will not be required. For example, an action under Section 303 of the Act (29 U.S.C. 187) for damages for a secondary boycott arising out of a contractual dispute will not be stayed

pending arbitration despite a broad arbitration clause since, traditionally, these cases have been resolved by the courts.

> "The resolution of the present controversy requires (1) a determination of whether the union violated Section 8(b)(4) of the NLRA, and (2) an assessment of the actual business injuries sustained by the employer. Courts hardly can be considered less competent than a labor arbitrator whose forte is more likely to be in the area of contract disputes and 'employee's grievance claims. . . .' Drake Bakeries v. Local 50, 370 U.S. 254, 267. . . ."
>
> *Old Dutch Farms v. Local 584,* (CA 2) 359 F.2d 598, cert. denied 385 U.S. 832.

From this, the court proceeds to hold that the parties did not intend to submit to arbitration a statutory right.

The same rationale is applicable to the instant case. The expertise of a labor arbitrator in the area of "employee's grievance claims" certainly cannot compare with the expertise of the Board in ruling on unfair labor practices. The Supreme Court has, on a number of occasions, recognized the peculiar expertise of the Board in this area. Certainly, if the United States Supreme Court feels that the federal courts lack the expertise of the Board in the area of unfair labor practice charges, it is warped logic to think that an arbitrator whose forte is employee grievance claims possesses that expertise.

C. The Board Lacks the Jurisdiction to Deprive the Charging Parties of an Independent, Alternative Remedy.

Section 5 of the arbitration clause provides that:

> "No controversy regarding hours or wages shall be subject to arbitration hereunder and the provisions of this article shall not in any way interfere with the right of any party to seek relief at law, in equity, or before any administrative tribunal where a controversy regarding hours or wages exists."

As we have indicated, the Board majority, in its determination to subcontract out as many unfair labor practice cases as possible, has been compelled to perform a remarkable legalistic gyration.

Clearly, when the employer unilaterally changed the wages and benefits of the employees, there existed a controversy regarding wages. However, the Board, in effect, says there is no controversy regarding wages because the dispute is whether or not the contract even exists. The contract clearly contemplates that the grievance machinery shall not be the sole and exclusive remedy for the vindication of employees' rights insofar as hours and wages are concerned. The Board cannot write into the contract such an exclusive remedy. Neither can the Board deprive the employees of an alternative remedy. As recently as October 10, 1972, the 9th Circuit called to the Board's attention the fact that the Board may not foreclose a litigant's alternative remedy under the Act.

> "Nor do we find the law to be that due deference to the expertise of the Board compels us to reject a litigant's resort to [illegible] applicable section of the

Act because there is another that might be equally applicable."

Waterway Terminals Co. v. NLRB, (CA 9, Oct. 10, 1972) .... F.2d ...., 81 LRRM 2449.

In some circumstances, the authority of the Board and the law of contract are overlapping, concurrent regimes, neither preempting the other.

The Board is expressly invited by the Act to determine whether an employer has refused to bargain in good faith and thereby violated 8(a)(5). It is appropriate, then, for the Board to exercise its jurisdiction.

NLRB v. Strong, 393 U.S. 357, 361.

The mere existence of alternative remedies does not mean that there is only one remedy or that one remedy is totally dependent upon the other. A suitor may select either, or both, if the law so provides.

International Longshoremen & Warehousemen's Union v. June Spruce Corporation, 342 U.S. 237, 243, 96 L.ed. 275, 281.

D. The Board Lacks the Jurisdiction to Deprive the Charging Parties of the Right to Strike, Absent Congressional Approval.

The *Collyer* doctrine, generally, and as applied in this case is violative of section 13 of the Act.

Section 13 of the Act provides that nothing in the Act *except* as specifically provided for therein shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitation or qualifications on that right.

Mastro Plastics v. NLRB, 350 U.S. 270, recognized the right of employees to strike to protest unfair labor

practices. *Mastro Plastics* was decided February 27, 1956. It was before Congress when it adopted the 1959 amendments to the Act.

An examination of the legislative history of the Labor Management Reporting and Disclosure Act of 1959 reveals over and over again the recognition by Congress that inherent in those rights protected by the Act was the right of unfair labor practice strikers to take economic action despite the existence of "no-strike" clauses as that right had been spelled out in *Mastro Plastics, supra*. Senate Report No. 187 on S. 1555 noted:

> "Unions enjoy a right to strike without either the Union or its members being penalized therefore. If the strike results from the Employer's unfair practice, the strikers cannot be replaced." (pp. 511-512).

Senator Barry Goldwater of Arizona, presented the issue as simply as this:

> "Question. What about a man who is on strike. Does he have any rights he hasn't had before?
>
> "Answer. Under existing law, where you have a strike which does not result from a violation of the law by the employer, I might point out this: If a Union strikes because the Employer is violating the Taft-Hartley Act, then his strikers always remain his employees. He can never replace them if they want their jobs back. They remain his employees for all purposes. If they want to come back, the Employer must take them back even if he's got another replacement in their place." (p. 1830).

Senator Douglas likewise pointed out the special rights of unfair labor practice strikers (p. 1856).

In view of all of this recognition of the right of unfair practice employees to strike even in the face of a

contract with a no-strike clause, can the Board, in the face of Section 13 of the Act abrogate the right guaranteed under *Mastro Plastics* and hurl the employees under the juggernaut of the *Boys Market* decision?*

The National Labor Relations Board has released its 36th Annual Report of the National Labor Relations Board for the fiscal year ended June 30, 1971. Table 3A (p. 154) indicates that during the fiscal year 1971 the Board issued decisions and orders in 786 unfair labor practice charge cases against Employers, that during the same period 1826 complaints were issued against Employers for violating Section 8 (a) of the Act.

Table 4 indicates that the threat of remedial action by the Board, as well as the remedial action, led to monetary recovery to employees of $4,825,575. This taken together with Table 2 which shows that violations of Sections 8(a)(1) totalled $15,467.00, 8(a)(3) totalled $10,368, and 8(a)(5) totalled $5,018 indicates the unbelievable broad range of protective activity that has been stripped from the charging parties by administrative fiat.

As recently as November 7, 1972, the rights of unfair labor practice strikers spelled out in *Mastro Plastics, supra,* has been reaffirmed by the United States Supreme Court (*NLRB v. International Van Lines,* 409 U.S. 48, 34 L.ed.2d 201).

Where do unfair labor practice strikers stand now? More important, is there such a thing as an unfair

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*The *Collyer* doctrine represents an amendment to the Norris LaGuardia Act that even the United States Supreme Court in *Boys Market* had difficulty justifying. How can the Board claim such an overwhelming change in the law without Congressional approval? *Boys Market v. Retail Clerks Local 770,* 398 U.S. 235.

labor practice striker now? If all of those persons who would have been entitled to the protection of the Act if they struck in protest against unfair labor practices are no longer protected by Section 13 of the Act, then their right to strike may be halted under *Boys Market, supra.*

Does the Board mean that all of those employees in the cooked food department at the Patman Meat Company who had their wages slashed unilaterally, who were the subject of discussions concerning "advised" arbitrations, who were the subject of a proposed modification of an agreement which they unanimously rejected, who were the subject of a scheme to accept the dismissal of an unfair labor practice charge without appeal as a basis for reducing their wages, are these employees no longer entitled to the right to strike guaranteed by Section 13 of the Act? Does *Mastro Plastics, supra,* no longer apply to them? Are they foreigners to the protection of *International Van Lines?*

The answer to these questions is found in *Atlantic Richfield Co.,* 199 NLRB No. 135, 81 LRRM 1412, by indicating that where it defers to arbitration, *Mastro Plastics, supra,* is no longer applicable. Member Fanning bitterly summed up the majority's decision:

> "Even if the arbitrator were to find the suspension or discharges unlawful, in the majority's view, the strikers joining and protesting them are not entitled to protection as unfair labor practice strikers. As a consequence, for example, since the majority now defers discriminatory discharge cases to arbitration, on the grounds that a contract provision restricting discharges to 'good cause' makes them arbitrable, a strike to protest and rectify such discharges, heretofore an unfair labor practice

strike with the strikers entitled to substantial protection, will no longer receive the protection afforded by the act and board decisions."

V.

Fiscal Considerations Do Not Entitle the Board to Arbitrarily Deprive Any Group of Employees of the Protection of the Act.

As we have indicated in Section II above, the problem of reducing the areas in which the Board will decide cases based upon fiscal consideration is one which has interested Congress and which led to the amendment to Section 10(a) of the Act which relates to uniform application of minimum dollar standards.

This attempt by the Board to strip from the protection of the Act any employee arguably covered by a collective bargaining agreement is totally arbitrary and totally beyond the Board's power.

There is little difference between such a classification, for fiscal reasons, and the Board's refusal, in the past, to exercise jurisdiction over entire industries which was also held by the Supreme Court to be arbitrary.

For, as the Supreme Court noted:

"To do so would but grant to the Board the congressional power of repeal."

Thereafter, the court noted that:

"We therefore conclude that the Board's declination of jurisdiction was contrary to the intent of Congress, was arbitrary, and was beyond its power."

Office Employees International Union v. NLRB, 353 U.S. 313, 320, 1 L.ed.2d 846, 850-851;

Hotel Employees Local 255 v. Leedom, 358 U.S. 99, 3 L.ed.2d 143.

VI.

The Establishment of Standards for Deferral of Violations of Federal Law to Arbitrations Must Be Made Clear and Certain.

Each *Collyer* type of decision is the product of a divided Board, unless its three proponents make up the case panel. Even in these circumstances, there may be concurring opinions with differing standards.

An overview of the entire subject of deferral to arbitration will reflect two major categories of disputes. One, where the existence of the contract is not in dispute, the issue is one involving application of the language of the contract, the rights of individual grievants have the total loyalty of the Union and no overriding questions of federal law are involved. In sum, a plain "nuts and bolts" grievance which an arbitrator can comfortably resolve under the body of industrial law reflected by the contract and the language of the shop.

The second category of dispute involves statutory rights which are not coexistensive with the contract, disputes outside the framework of the contract and involving governmental expertise in the application of the statute and principal questions invoking the application of the Act. This is the area of Board expertise which is well beyond an arbitrator's expertise; an area where the more formal rules of evidence apply.

Petitioner suggests that the same test which the Court has applied in Federal-State preemption cases can be readily adapted to deferral cases.

While in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.ed.2d 775, this Court held that conduct which would arguably constitute an unfair labor practice under Section 8 of the Act preempted

the field to the exclusion of state or federal court jurisdiction, where the violation was of only peripheral concern to national labor policy and of primary concern to legitimate state interests, preemption would not apply.

Linn v. United Plant Guard Workers, 383 U.S. 53, 61, 15 L.ed.2d 582, 589;

United Const. Workers v. Laburnum, 347 U.S. 656, 98 L.ed. 1025.

Here, we suggest that the first category of dispute may be merely a peripheral concern of the Labor Management Relations Act, and subject to deferral to arbitration, while the second category is of primary importance to uniform federal labor policy and must be decided by the Board.

Conclusion.

For the reasons stated, this Petition for a Writ of Certiorari should be granted.

Dated: April 23, 1974.

Respectfully submitted,

LIONEL RICHMAN,
IVAN J. POTTS,
Attorneys for Petitioner.

APPENDIX.

Judgment.

United States Court of Appeals, for the Ninth Circuit.

Provision House Workers Union Local 274, AFL-CIO, Petitioner, v. National Labor Relations Board, Respondent. No. 72-2617.

Before: KOELSCH, HUFSTEDLER, and TRASK, Circuit Judges.

THIS CAUSE came on to be heard upon a petition to review the Order of the National Labor Relations Board dismissing the complaint against Urban N. Patman, Inc., its officers, agents, successors, and assigns, dated June 30, 1972. The Court heard argument of respective counsel on February 7, 1974, and has considered the briefs and transcript of record filed in this cause. On February 21, 1974, the Court being fully advised in the premises, issued a memorandum denying the petition for review. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the petition for review filed by Provision House Workers Union Local 274, AFL-CIO, be and it is hereby denied.

With Costs in this Court in favor of the respondent and against the petitioner.

Costs:

Brief of the Board $243.80

Endorsed, Judgment Filed and Entered April 9, 1974.

/s /Emil E. Melfi, Jr.,
Chief Deputy and Acting Clerk

A TRUE COPY April 9, 1974,

ATTEST: Emil E. Melfi, Jr., Chief Deputy & Acting Clerk

by /s/ Ray Hewitt
Ray Hewitt, Deputy

Memorandum.

United States Court of Appeals for the Ninth Circuit.

Provision House Workers Union Local 274, AFL-CIO, Petitioner, v. National Labor Relations Board, Respondent, and Urban Patman, Inc., Intervenor. No. 72-2617.

On Petition to Review an Order of the National Labor Relations Board.

Filed: Feb. 21, 1974.

Before: KOELSCH, HUFSTEDLER, and TRASK, Circuit Judges.

The Board did not exceed its jurisdiction, nor did it abuse its discretion in deferring exercise of that jurisdiction pending arbitration. (National Labor Relations Act §§ 1, 10(a), 29 U.S.C. §§ 151, 160(a); Labor-Management Relations Act § 203(d), 29 U.S.C. § 173(d). *Cf. Nabisco, Inc. v. N.L.R.B.* (2d Cir. 1973) 479 F.2d 770.) Although the characterization of the dispute as one involving interpretation of a contract, rather than existence of the contract, is not wholly free from doubt, we cannot say that the Board abused its discretion in concluding that contract interpretation was the gravamen of the dispute.

Of course, the Board cannot abdicate its statutory responsibilities by inappropriate deferrals to arbitration. The record before us raises no inference that the Board failed to perform its duties.

Petition denied.

Decision and Order.

United States of America, Before the National Labor Relations Board.

Urban N. Patman, Inc. and Provision House Workers Union Local No. 274, AFL-CIO. Case 21-CA-10108.

On February 7, 1972, Trial Examiner James R. Hemingway issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions with supporting brief, and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings, and conclusions, only to the extent consistent herein.

The Trial Examiner found that Respondent's unilateral change of the wage rates and fringe benefits of the employees in its precooked foods department during the term of the collective-bargaining agreement, without complying with the provisions of Section 8(d) of the Act, violated Section 8(a)(5) and (1). In making this determination, he concluded, for reasons set forth below, that the issue involved herein could not be arbitrated within the terms of the contract. We disagree.

The Union contends that the present sausage industry agreement covers Respondent's precooked foods de-

partment employees as well as the sausage department employees and, therefore, on June 22, 1971, when Respondent recalled its laid-off precooked foods department employees at lower wages and fringes than they were enjoying prior to layoff, it violated Section 8(a)(5) and (1) of the Act. Respondent, on the other hand, maintains that the precooked foods department employees are not covered by the contract, so that after consulting with the Union, which it did, it could lawfully change the wages and fringe benefits it had been paying those employees. The essence of the dispute, then, is whether the present contract covers the precooked foods department employees and, in our opinion, can best be resolved by arbitration.

The grievance machinery provisions of the contract state, in part:

> 2. No employee covered by this Agreement shall be demoted, suspended, dismissed or otherwise disciplined without just and sufficient cause. Should any action by an Employer cause an employee covered by this Agreement to become aggrieved, such employee shall orally or in writing make his complaint to the Union. . . .
>
> * * *
>
> 4. In the event the parties are unable to resolve any dispute through the grievance procedure set forth in Section 2 hereof, either party may demand that the dispute proceed to arbitration. . . .
>
> 5. The findings of the arbitrator shall be binding upon both the Union and the Employer providing, however, that the arbitrator shall not have the authority to change, alter or modify any of the terms or provisions of this Agreement.

> No controversy regarding hours or wages shall be subject to arbitration hereunder and the provisions of this Article shall not in any way interfere with the right of any party to seek relief at law, in equity, or before any administrative tribunal where a controversy regarding hours or wages exists.

The Trial Examiner concluded that the Board could not defer to arbitration for three reasons: (1) section 2 of the grievance provisions requires that an employee must file a grievance in order for the dispute to proceed to arbitration, and no such grievance was filed in this case; (2) the issue involved herein is one of wages and section 5 indicates that the parties contemplated no arbitration of such a dispute; and (3) the contract clearly shows that arbitration was not intended as an exclusive forum for resolving contract disputes.

As to 1, the filing of a grievance is not a prerequisite to deferral for, in the lead case of *Collyer,*[1] no such grievance had been filed. As to 2, we find merit in Respondent's contention that this dispute is arguably one of whether the contract covers the precooked food department employees, and not one of wages. Moreover, arbitrability of such disputes is properly determinable by an arbitrator. As to 3, section 5 merely reserves to the parties access to an administrative tribunal where a controversy regarding hours or wages exists, but does not apply, by its terms, to a contract coverage dispute as involved herein.

We believe, therefore, that this dispute is properly one for deferral within the meaning of *Collyer* and

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[1] *Collyer Insulated Wire, A Gulf and Western Systems Company,* 192 NLRB No. 150.

warrants our requiring the parties to honor their contractual grievance and arbitration obligations. We shall, accordingly, dismiss the complaint in the present case, but shall retain jurisdiction to entertain an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, within reasonable promptness after the issuance of this Decision, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the dispute has been duly found by the arbitrator not to be arbitrable, or (c) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board orders that the complaint be, and it hereby is, dismissed; provided, however, that:

Jurisdiction of this proceeding is hereby retained for the limited purposes indicated in our Decision herein.

Dated, Washington, D.C. June 30, 1972.

Ralph E. Kennedy,
Member

John A. Penello,
Member

NATIONAL LABOR RELATIONS
BOARD

[Seal]

Member Jenkins, dissenting:

For the reasons ably expressed by the Trial Examiner, and for the reasons Member Fanning and I have expressed in prior dissents to the majority's action of deferring statutory issues to arbitration, I would not so defer but would determine the case on the merits—as I conceive our duty under the Act requires us to do.

Howard Jenkins, Jr.,
Member

NATIONAL LABOR RELATIONS BOARD

Errata.

United States of America, Before the National Labor Relations Board, Division of Trial Examiners, Branch Office, San Francisco, California.

Urban N. Patman, Inc. and Provision House Workers Union Local No. 274, AFL-CIO. Case No. 21-CA-10108.

On page 12, in footnote 12, last line, change 195 F. 2d 206 to 195 F.2d 906.

On page 16, footnote 17, change *Kinnard* to *Kinard.*

/s/ James R. Hemingway
James R. Hemingway
Trial Examiner

Dated: February 14, 1972.

Trial Examiner's Decision.

United States of America, Before the National Labor Relations Board, Division of Trial Examiners, Branch Office, San Francisco, California.

Urban N. Patman, Inc. and Provision House Workers Union Local No. 274, AFL-CIO. Case No. 21-CA-10108.

Robert H. Miller, for the General Counsel. *Hill, Farrer & Burrill,* of Los Angeles, Calif., by *Kenneth M. Simon* and *Stanley Tobin,* for the Respondent.

Statement of the Case

JAMES R. HEMINGWAY, Trial Examiner: This case was tried at Los Angeles, California, from November 3 to 5, 1971.[1] The charge was filed on June 28, and the complaint was issued on August 3. Respondent filed an answer on September 9. The principal issues are whether or not Respondent and the Union had contracted concerning a certain group of employees not specifically mentioned in an existing collective-bargaining agreement and whether or not a unilateral reduction in pay for such employees constituted a violation of Section 8(a)(5) and (1) of the Act. Briefs were filed by the Respondent and the General Counsel. Each also filed a motion for corrections in the transcript, and the General Counsel filed an opposition to one correction requested by Respondent. Ruling on these motions is contained in Appendix B hereto attached.

Upon the entire record, including my observation of the demeanor of the witnesses, and upon due consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

[1]Dates herein are all in 1971 unless otherwise stated.

Findings of Fact

I. Jurisdictional Facts

Respondent is a corporation with its principal place of business in Los Angeles, California, where it is engaged in the business of selling and supplying meat products to restaurants and schools.[2]

During the calendar year 1970, Respondent, in the normal course and conduct of its business operations, sold and shipped goods, products, and services valued in excess of $50,000 directly to customers located outside the State of California.

Respondent concedes and, I find, the Board has jurisdiction, and it will effectuate the policies of the Act to assert jurisdiction in this case.

II. The Labor Organization

The Union is, and has been at all times material herein, a labor organization representing certain employees of Respondent under two collective-bargaining agreements.

III. The Unfair Labor Practices

A. *The Refusal to Bargain*

1. Background

Prior to 1968 Respondent's principal business had been sausage manufacturing, with some fresh meat processing. In the year 1968, Respondent started a precooked foods department. The department was started on a small scale (two employees) early in 1968 on a trial basis with equipment limited to a single broiler.

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[2]The findings in this section are based on admitted allegations of the complaint.

As the market for such food products proved good, the department was expanded a little at a time. Equipment was added in 1969 and thereafter, and the number of employees was steadily increased. By the end of 1968, Respondent had 20 employees in this department. By 1971, Respondent's sausage manufacturing and packing business, contrary to the trend in the precooked foods department, had declined. Respondent then had approximately 13 employees in what had once been its main operation. On the other hand, the precooked foods department had expanded to a point where, at peak in 1971, Respondent employed approximately 44 employees there.

2. The Appropriate Unit

The Complaint alleges and the Answer admits that the appropriate unit consists of all production employees, including a long list not necessary to repeat in detail here. The list was copied from a collective-bargaining agreement. Respondent is a member of a multi-employer bargaining association known as Associated Meat Jobbers of Southern California, herein called Meat Jobbers. The Union and Meat Jobbers have for many years negotiated collective-bargaining agreements for employers and employees engaged in the fresh meat business of processing beef, lamb, and pork into uncooked steaks, hamburgers, chops and roasts for sale to such buyers as restaurants.[3]

In past years, Respondent's principal business was in the processing of pork (and some beef) into sausage,

[3]Respondent's relations with the Union began in 1932. Except for background purposes, this agreement between the Union and the Meat Jobbers, which was binding on the Respondent, is not relied on by the parties in this case.

bacon, ham, hot dogs and corned beef. The Union also represented Respondent's employees engaged in this phase of the business, but it did not negotiate an agreement covering it with the Meat Jobbers or with the Respondent. Instead, it negotiated an agreement covering workers engaged in this phase of the business with a group of independent sausage industry employers described in the Union's agreement as Independent Sausage Kitchens, who had a bargaining agent other than the Meat Jobbers—one who did not represent the Respondent. Members of the Meat Jobbers (including the Respondent) who have sausage operations and who are not represented by the agent of the Independent Sausage Kitchens have usually authorized Meat Jobbers to adopt the Union's independent sausage industry agreement on their behalf. The Independent Sausage Kitchen contracts for the years 1967 to 1970 and its succeeding one for 1970-1973 covered employers classified under the following departments: sausage department, pork processing department, lard department, and fresh meat and shipping.[4] These contracts provided for a union shop.

As stated, the Respondent in 1968 started what gradually developed into a precooked foods department.[5]

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[4]Presumably the latter department was included for employers not bargaining through the Meat Jobbers.

[5]Precooked foods concern the preparation of such cooked foods as cooked hamburger patties, meatballs, chicken-fried steaks, and pork chops. These products Respondent sold to a new line of customers, such as school cafeterias and company commissaries over a large portion of the country, whereas Respondent's other products were sold to more local customers, such as restaurants. The sales methods also differed. Instead of dealing direct with customers, the practice in precooked foods was to deal through a broker who would submit bids to school districts or other prospective buyers, who would let the contract to the low bidder. Bids were taken once or twice a year or sometimes three times a year.

Whereas the Respondent started it on an experimental basis, it enlarged and improved the machinery and capacity. In 1969, Respondent installed, at a substantial cost a mechanical system with increased capacity.

During 1969 and 1970, Respondent's sausage business declined. As sausage department employees would be laid off, the Respondent would, if there was room, offer them jobs in the precooked foods department. By May 1971, there were only 13 employees in the sausage department, but at peak production there were 44 employees in the precooked foods department. The record does not show what proportion of these started in the sausage department and what proportion was hired from outside.

From the start of the precooked foods department, although neither existing union contract specifically mentioned employees in the precooked foods department, Respondent paid the employees in the latter department at a rate for each job most nearly equal in function to that under the sausage industry agreement. Donald Patman, Respondent's treasurer and manager of the precooked foods department, testified that job functions and skills in the precooked foods department were different from those in the sausage department, but there was a similarity, and many of the jobs in the precooked foods department could be described with the same titles as those in the sausage department. Under the Union's Independent Sausage contract, the wage rates were determined by assigning "bracket numbers" to each job and then listing rates of pay for each bracket number. The wage rates for employees in the precooked foods department were fixed by the Respondent on the basis of comparable jobs found in the sau-

sage contract. For example, meat grinders in the precooked foods department (although the job might entail somewhat different functions) were paid at a bracket rate such as meat grinders would receive in the sausage department. For jobs in the precooked foods department that had no equivalent in the sausage department, such as quality control inspection and packing and boxing of precooked foods, rates were unilaterally set by the Respondent by assigning bracket numbers to those jobs and paying the rate for such bracket as was listed in the sausage contract.

In August, September, and October of 1970, the Union and Meat Jobbers engaged in negotiations for a new meat-cutters contract. Respondent's attorney, Kenneth Simon, represented the Meat Jobbers. During this period, having some information that its competitors were able to underbid it because they had lower wage rates, Respondent requested Simon to discuss with the representatives of the Union the need for negotiating a special set of rates and fringe benefits for employees in the precooked foods department during negotiations of the sausage contract, which were also then in progress. When Simon mentioned to union representatives the need for a consideration of separate rates for the employees in the precooked foods department, he was told that there could be no discussion of that matter because there were more important items on the bargaining table. I deduce that the Union did not wish to consider a problem that affected only one of a large number of sausage makers before negotiations were completed on the general agreement.

The Union and the Independent Sausage Kitchens reached agreement on a new contract in November 1970, and the union membership, which included em-

ployees of Respondent, ratified that agreement on November 28. The exact schedule of events is not clear, but during November of 1970, President Patman telephoned Robert Cook, executive secretary of the Union, and told him he had a tremendous problem and wished to discuss it with Cook. Cook told Patman that he would get in touch with him. When Cook did not do so, Patman attempted on five different occasions to reach him but got no answer. Later he heard that Cook was ill.

Respondent learned of the ratification of the sausage industry agreement in early December 1970. Although Respondent had not been involved in its negotiations and although the Meat Jobbers had not yet signed that agreement on behalf of Respondent, as it had been accustomed to do, and although the agreement did not contain rates for certain of the job titles in the precooked foods department, the Respondent, nevertheless, in December, 1970, gave wage increases retroactively (as called for by the sausage agreement) as well as other benefits called for by that agreement not only to its employees in the sausage department but also to those in its precooked foods department. It deducted union dues, paid health and welfare sums, contributed to retirement, pensions, dental care plans, paid change of clothes time, etc., for precooked foods employees as well as for sausage department employees. President Urban Patman of the Respondent testified that the reason he did this was to "have a minimum amount of trouble [with the union] until we could resolve [with the union] the problem in the precooked foods department."[6]

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[6]Urban Patman testified that "ever since I have been in this Union, and this has been over 35 years—I always talked to the

(This footnote is continued on next page)

3. Unilateral Changes

During the early part of 1971, the Respondent ascertained that it not only was losing bids but that it was suffering operating losses. From the summer of 1970 on, it was experiencing difficulty in bidding successfully on contracts for precooked foods because its competitors were underbidding the Respondent. The biggest precooked foods processor competing with Respondent was Pronto Foods, a Chicago company, which got a contract with Los Angeles schools, underbidding the Respondent. Through his connection with National Association of Processed Food Manufacturers, Treasurer Patman learned that Pronto's rates were in some instances less than half those of Respondent, and gradually he learned that none of Respondent's other competitors in the precooked foods business paid higher rates than Pronto. As time passed, he would gradually pick up such information on occasions when the Respondent would lose bids.

Respondent's competitors had collective-bargaining agreements, in most instances, with labor organizations unconnected with the Union or with the parent labor organization with which the Union was affiliated. On March 9, 1971, President Patman learned that Custom-Redi Foods, a competitor, believed to be owned by a company called Butcher Boy, was selling its

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head man," who in 1970 was Cook. I interpret this statement to mean that Patman, in his business, had had contractual relations with the Union for 35 years. His attempt to have a minimum amount of trouble with the Union, I find, referred to a desire to remain on amicable terms with the Union.

precooked foods operation in the Los Angeles area. Patman was invited to that plant as a prospective purchaser. He went there and learned that Custom-Redi was paying, under a union contract, the same wage rates as Pronto and another precooked food producer (Larry Sandwiches) in the Los Angeles area. He also learned that Butcher Boy, at another precooked foods operation, this one in Riverside, a city about 50 miles east of Los Angeles, had a contract for the same rates as in Los Angeles, and that the Riverside contract was with the Amalgamated Meat Cutters and Butcher Workmen, the parent organization of the Union. He further inquired and learned that Pronto (in Chicago), a major competitor, also had a contract with the Amalgamated Meat Cutters.

Later in March, when Jesus Murillo, a business agent for the Union, was visiting Respondent's plant with Jim Zaharis, the Union's president and business agent, in connection with a grievance, President Patman requested that they come to his office. When they were there, Patman told them what he had learned about the rates under contracts which competitors had with various labor organizations, including the two with the Amalgamated. He told them that he had $500,000 in equipment for the precooked foods operation that would have to stay idle unless he could get a contract that was equal to that of his competitors. Zaharis said that they understood the Respondent's problem. He told Patman that the Union would find it difficult to tell the workers that they would have to take a cut in pay and fringe

benefits, but said that he would take the problem to Cook, the executive secretary for the Union, and ask him to schedule a meeting with Patman.

Cook arranged such a meeting in late April, and, pursuant to such arrangement, Cook and Zaharis met with President Patman. Patman told the Union representatives that it was economically impossible to exist on a total package of $5.05 (including fringe benefits), which he was paying, as against $2.48 paid for the same thing by his competitors. Cook said that he sympathized with Patman but that he had no authority to change the existing contract. However, he said that he would see the International's representative and get in touch with Patman later.

Following his meeting with Cook and Zaharis, Patman telephoned his attorney, Simon, told him that the Union appeared to be friendly, and asked him to see what he could work out with the Union. Simon met with Cook, Zaharis, and Murillo on May 12. Simon again related the Respondent's situation and the unfairness of the Union's International having contracts with competitors at much lower rates. He requested the Union to get him copies of such contracts. Cook testified that Simon at this meeting had said that the Respondent's proposal would apply only to new employees. Simon denied making such statement and testified that he had only requested negotiations for rates considering the jobs in the precooked foods department as new jobs. In a subsequent meeting, a proposal was made that, if an agreement were reached

respecting lower rates for the precooked foods jobs, such rates would apply only to the newer employees and that the older ones (those originally working in the sausage department) would be given an opportunity to transfer back to the sausage or fresh meat departments so as to retain the higher rates provided under the sausage agreement. Simon testified that there had been some discussion in one of the meetings about the possibility of protection to be given to some of the older employees so that the new rates would not apply to them. I find a basis for a possible misunderstanding as to the meaning of "old" and "new" employees. Cook told Simon that he was going to talk with an International representative of the Union named Osslo on May 14, and would see if he could get approval of the proposal for lower rates. Cook did, on that date, meet with Osslo and told him the problem. Osslo, as quoted by Cook, said they could agree on lower rates for employees thereafter to be hired. Cook told Osslo that was all that the Respondent wanted.

On May 18, Simon telephoned Zaharis about another meeting. Zaharis urged Simon to telephone Cook. Simon did so, and another meeting was arranged for May 28. On that date, they met, and Cook gave Simon copies of the contracts that Simon had requested. Simon said that he would like to study them to make a comparative analysis, that he would meet with Patman the next day, and that it was necessary that the matter be resolved quickly, because the Respondent, by June 4, had to submit a bid on the Los

Angeles District School System contract. The Respondent and the Union agreed to resume their meeting on June 2.

It is undisputed that the Respondent has an annual layoff in June. Even earlier than June, production had fallen off in the precooked foods department to a point where it was necessary to lay off the second and third shift employees. The first shift employees were laid off at the end of the day on Friday, May 28. Between that date and June 2, the Union notified the laid-off employees of each of the shifts, 44 in number, that there would be a meeting on the night of June 2.

During the day of June 2, Simon met with union representatives Zaharis and Murillo (Cook was out of town until later in the day) and presented a proposed agreement based on rates and fringe benefits contained in the agreements of competitors. He gave the Union listed rates for five classes of employees and indicated the fringe benefits that he would propose. The Union against raised the question of protection of rates for old employees. Simon gave the names of five employees who had been in the precooked foods department since 1968 and who were to retain their rate of pay. Simon had discussed this subject with Patman on May 29, and Patman had said that he could not have employees working side by side with separate wage rates, one being higher than the other, but Patman had said that he could transfer the older employees at the higher rates into other operations than precooked foods so that they could maintain their high rates. Simon con-

veyed this information to the Union's representatives, Zaharis and Murillo, at their June 2 meeting. They said that they would present it to the membership for vote that night. Upon Cook's return to town on the afternoon of June 2, he learned of the Respondent's proposal and telephoned Simon to ask why only five employees were to remain at their old rate. Simon told him that was the Respondent's proposal.

That evening the three representatives of the Union met with the 21 laid-off employees who had attended. Cook told the employees that the Respondent, because of competitition, was desirous of operating at the rates which had been submitted to the Union that day. He told them that, if the Respondent could not meet the competition, it would have to close that department. Upon being questioned by an employee about whether or not they did not already have a contract, Cook told them that they had.[7] When the matter was put to a vote, the employees voted against accepting the Respondent's proposal. Later, Cook telephoned Simon and informed him of the vote. Simon's only comment was, "We have a problem."

On June 3, Simon spoke with Lionel Richman, the Union's attorney, and explained the Respondent's problem and the employees' rejection of the Respond-

[7]Cook apparently did not mention the fact that the Respondent's representative had not yet signed the sausage agreement. He gave evidence of presuming that the contract came into existence as soon as the Union's membership had ratified it, even though the Respondent was not a party to negotiation of the sausage contract.

ent's proposal. On that day and thereafter for a couple of weeks, Simon and Richman discussed various courses that the parties might take to solve the Respondent's problem, without which, it was believed; the Respondent could not reopen its precooked foods operation.

A proposal by Simon for arbitration was, for a time, taken under consideration but was ultimately rejected by Richman.[8] They discussed a possible RM petition. The basis of such a filing was not revealed, but it could presumably, have been based on a possible claim of representation by the Teamsters. This plan was abandoned as too dangerous because the Teamsters might win the election. In his talks with Richman, Simon had advanced the argument that, as to the employees in the precooked foods department, there was no contract, so Richman suggested that, if Simon thought he could sustain his theory that there was no contract, Richman would file a charge of violation of Section 8(a)(5) of the Act and, if the Regional Director should find that there was no contract in existence and would refuse to issue a complaint, Richman would accept his decision without appeal, and he could then tell the Union that there was no contract.[9] As appears, the Union filed the charge in this case on June

[8]Simon testified that Richman told him that he would recommend arbitration of the dispute to the Union, and that it was on this expectation that he had authorized the Meat Jobbers (employer representative of Respondent) to sign the sausage agreement. The signing took place on June 17.

[9]The evidence does not fix the date of this conversation, but Richman thought it was in mid-June.

24, 1971. However, the Regional Director did not dismiss the charge. Subsequently (August 31, 1971), a complaint was issued.

Meanwhile, on June 20, after a conversation with Patman in which Patman told Simon of the urgency of planning a reopening if the Respondent was to reopen at all, Simon advised him that Article IV, Section 12 of the sausage agreement (which provided that "in the event that there are new jobs or classifications or new machines they shall be subject to immediate negotiations. . . .") justified his claim to a right to negotiate new rates. Simon thereupon drafted a letter, dated June 22, and addressed it to the precooked-food employees last laid off, telling them that the annual layoff, which began on May 31, would end on June 25, but that, because the Respondent was losing money in the operation, it could reopen only with employee wages and benefits which did not cost more than its competitors were paying. The letter continued by setting out the wages and fringe benefits that precooked food employees would receive after June 28. These were the same as those which had been presented to the Union on June 2 and had been rejected by the employees that night. The letter also informed the employees that anyone who had worked for Respondent before the annual closing would receive the rate provided for employees who had worked for six months regardless of the length of time the addressees had actually worked, with only newly hired employees beginning at the "start" rate. They were informed that if they wished

to work in the precooked foods department, they should report for work at 7:30 a.m. on June 28, 1971.

According to Simon, he saw Richman on June 21, 1971, and told him that he had drafted the aforesaid letter and was calling the employees back on the basis of that letter. According to Simon, it was on this occasion that Richman rejected arbitration as a solution to the Respondent's problem.

On June 28, approximately 17 of the 19 employees recalled returned to work. The remaining two vacancies were filled by calling the next seniormost employees. The wages, economic benefits, and other condition of employment outlined in the June 22 letter were instituted and were continued thereafter. They were still in effect at the date of the hearing. Virtually all of these wages and conditions are less than those listed in the contract between the Union and the Independent Sausage Kitchens of Los Angeles—less than 50 percent in some cases and close to 50 percent for others.

On an occasion after June 28 (the record was not clear on the exact date), Simon asked Cook if there could be some intermediate position between the rates Respondent was instituting and the full contract rates. Cook said he was going to speak to Osslo when he would be in San Diego for a meeting and that he would ask Osslo about a possible intermediate position. On October 5, 1971, Simon encountered Cook again at a Federal Mediation Service office during proceedings in a matter not concerning the Respondent, and,

at that time, Cook told Simon that Osslo had said there could be no intermediate position. There is no evidence of any other attempt to reach accord before the hearing.

B. *Arguments and Conclusions*

The General Counsel argues that the Union's 1967 sausage industry agreement covered the precooked foods department employees when that department was initiated in 1968, because the Respondent paid wage rates listed in the contract and applied all other provisions of the sausage industry agreement to the employees in that department; because some employees were transferred from the sausage department to the precooked foods department; and because the job duties were, if not the same, at least similar to those of the sausage department employees. Although the General Counsel does not expressly so state, his argument seems to suggest that the precooked foods department constituted either a growth of, or an accretion to, the existing unit.[10] The Respondent does not dispute the description of the unit alleged in the complaint to be appropriate and does not argue that there was no ac-

[10]Although the employees in the fresh meat department were covered by the Meat Jobbers contract, while the sausage department employees were covered by a separate contract between the Union and the Respondent, the Respondent, by admitting the allegations of the complaint (which describes the appropriate unit as composed of all employees listed in both the sausage industry agreement and the Meat Jobbers agreement) admits that there was a single unit. The unit described in the complaint did not, however, expressly include one or two positions in the precooked foods department (as for example, the quality control inspector) which are not specifically mentioned in the sausage industry agreement.

cretion. On all the evidence, I conclude that the precooked foods department, although preparing different finished products and having slight variations in functions, must, nevertheless, under Board precedent, be regarded as an accretion to the existing unit.[11]

The Respondent also argues that the Union's independent sausage employers' agreement was not signed by Respondent or its agent until June 17, 1971, and that, by that time, the Respondent and the Union had already undertaken to try to work out a separate arrangement for the precooked foods department, thus demonstrating that that contract did not cover the precooked foods employees. The General Counsel, on the other hand, argues that the Respondent, although not having signed the agreement formally, had tacitly adopted it when, in December 1970, it implemented the provisions of the 1970-73 agreement by giving a retroactive wage increase to not only its sausage employees but also to its precooked foods employees and also gave effect to all other terms of that agreement as to both groups of employees. Many of the Respondent's arguments made in an effort to maintain that it did not refuse to bargain—such as, that it did not withdraw recognition but continued to deal with the Union, that it never modified or terminated any "applicable" existing contract, that an impasse was reached before it instituted the new wage rates and other terms of employment for the employees in the precooked foods

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[11] *Borg-Warner Corp.*, 113 NLRB 152, 231 F. 2d 237 (C.A. 7), cert. den. 352 U.S. 908; *Hudson Pulp and Paper Corp.*, 117 NLRB 416.

department—all presuppose that Respondent was not bound, before signing, by the independent sausage employers' agreement. However, despite the fact that that agreement was not signed on behalf of Respondent until June 17, 1971, the Respondent readily admits that it was already bound by that agreement from December 1970 as to all employees covered under it except the precooked foods employees, thereby admitting that the actual signing of the agreement was not a prerequisite to a binding agreement.

Although the Respondent did, in the fall of 1970, notify the Union that it desired to discuss the rates of pay of the precooked foods department employees, it did not suggest to the Union that those employees were not in the collective-bargaining unit or would not be covered by the independent sausage industry agreement or that it would not go along with that agreement, when reached, until the Union had reached agreement with the Respondent on rates for the precooked foods department. Instead, as had been its custom for many years, it considered itself bound by the independent sausage industry agreement as soon as it was informed that it had been ratified by the Union's membership, regardless of any delay in signing the formal agreement. I find, therefore, that the Respondent's delay in signing the Union's sausage industry agreement did not prevent that agreement from binding the parties thereto.[12] The Respondent argues that, although a

[12] *Huttig Sash & Door Company,* 151 NLRB 470, 474; *General Asbestos & Rubber Division, Raybestos-Manhattan, Inc.,* 183 NLRB No. 27; *Conway's Express,* 87 NLRB 972, enf'd 195 F. 2d 206 (C.A. 2).

contract between the Respondent and the Union may have existed, it did not yet exist for precooked foods employees because the contract contained a provision (Article IV, paragraph 12) of the contract that had not yet been complied with by the Union, to wit:

> 12. In the event that there are new jobs or classifications or new machines they shall be subject to immediate negotiations. . . .

If the Respondent could have invoked this clause for the precooked foods department, it could have done so under the 1967-70 agreement, which contained the same language. But it did not seek to do so. Its delay in seeking negotiations to fix such rates can be explained only on other grounds. Most of the jobs in the precooked foods department had the same titles as those in the sausage department. The functions of these jobs, though not identical, were similar enough to lead to the conclusion that they were covered by the same rates. Only in the case of one or two jobs was there a new category which the contract rates might arguably be said not to cover. But a failure or delay on the part of the Union to meet and agree with the Respondent on the rates for those jobs would not nullify the contract as to the precooked foods employees generally.

In view of the fact that the rates of the precooked foods employees appeared to be determined by the terms of the 1967-1970 sausage agreement, the Union could assume that there was no pressing need for setting a separate scale for those employees when the 1970-73 sausage contract was being negotiated. Re-

spondent's voluntary act of adopting the changes effected in the latter agreement, even as to precooked foods employees, gives every indication of an understanding that the independent sausage industry agreement was applicable to such employees.

The evidence shows that the negotiating of lower rates for the employees in the precooked foods department was a matter of some concern to the Respondent before December 1970, but this concern only began materially to move the Respondent to serious action during the early part of 1971 (long after it had adopted the independent sausage industry contract) as the Respondent gradually learned of the rates being paid by competitors in the precooked foods business, and the Respondent's concern expanded to a fervor when the Respondent learned not only how much lower were the rates of competitors but also learned that one of the unions contracting for such lower rates was the parent organization of the Respondent. This is what really spurred the Respondent to press the Union to agree to special rates for its precooked foods employees. In other words, the Respondent's conduct of giving effect to the sausage industry agreement in 1970 and its conduct starting in March 1971 gives rise to the conclusion that the Respondent was seeking relief from an existing agreement rather than negotiating one that had not previously covered the precooked foods employees, and the Respondent's attitude suggested that it thought the Union owed it relief because of the better agreements made by the Union's parent organiza-

tion with competing precooked foods employers. The sausage agreement did not contain a so-called favored nations clause; so the lower rates of competitiors (even if such a favored nations clause could have been invoked when lower rates are contained in a competitor's contract, not with the Union itself, but with the Union's parent organization) was not a legal ground for reopening the contract.

The Respondent also advances the argument that a clause in the contract provided for arbitration and that the Board should defer to arbitration as it did in *Collyer Insulated Wire*.[13] In that case, the Board reviewed earlier decisions and quoted with approval from *Jos. Schlitz Brewing Company*,[14] where the Board said:

> Thus, we believe that where, as here, the contract clearly provides for grievance and arbitration machinery, where the unilateral action taken is not designed to undermine the Union and is not patently erroneous but rather is based on a substantial claim of contractual privilege, and it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act, then the Board should defer to the arbitration clause conceived by the parties.

The arbitration clause in the contract between the Union and the Respondent is not so clearly invocable

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[13]192 NLRB No. 150.

[14]175 NLRB 141.

as it was in the *Collyer* or *Schlitz* cases. True, the agreement between the Respondent and the Union contains a provision:

> 4. In the event the parties are unable to resolve any dispute through the grievance procedure set forth in Section 2 hereof, either party may demand that the dispute proceed to arbitration. . . .

Section 2, referred to above, deals with employee grievances and it contemplates that the aggrieved employee shall initiate the grievance procedure. Until an employee files a grievance, the dispute cannot proceed to arbitration. In the instant case, there is no evidence that any employee had filed a grievance with the Union as required by the agreement. The agreement further expressly provides:

> 5. The findings of the arbitrator shall be binding upon both the Union and the Employer providing, however, that the arbitrator shall not have the authority to change, alter or modify any of the terms or provisions of this Agreement.
>
> No controversy regarding hours or wages shall be subject to arbitration hereunder and the provisions of this Article shall not in any way interfere with the right of any party to seek relief at law, in equity, or before any administrative tribunal where a controversy regarding hours or wages exists.

The meaning of the clause prohibiting arbitration of a controversy regarding hours or wages could be clearer as to parties contemplated as having a contro-

versy, but since this provision would be contrary to the one for arbitration in cases where an employee files a grievance (which could certainly be over wages due), the above clause can be read logically only as prohibiting arbitration of a dispute between the employer and the Union as to hours or wages which did not arise as a result of a grievance filed by an employee.

Even if the contract did contain a provision for arbitration, the Board would not be obliged to defer thereto. It could exercise its discretion to decide the case under the provisions of the Act.[15] However, in the case at hand, not only does it appear that the parties had contemplated no arbitration of wages in a dispute raised by the Respondent, but the contract clearly shows that the parties did not (as was the case in *Collyer*) contemplate arbitration as an exclusive forum for resolving contract disputes. On all the evidence, therefore, I find that the contract provisions for arbitration do not require or even permit arbitration of the dispute at hand. Hence, the *Collyer* decision is inapplicable to the instant case in any event.

The Respondent also contends, in effect, that, if it be found that there is in existence a contract which sets wage rates for employees in the precooked foods department then the Respondent's act of unilaterally fixing lower rates was a breach of contract which, says the Respondent, the "Board should not and will not adjudicate." However, if the Respondent's conduct is of

[15] *Gateway Transportation Co., Inc.*, 193 NLRB No. 1.

a kind condemned by the Act, the Board is not ousted of jurisdiction simply because the Respondent's act also constitutes a breach of contract.[16] The Respondent's act of unilaterally changing the wage rates and fringe benefits provided for by the contract without concurrence of the Union is not only a breach of contract but is also a violation of Section 8(a)(5) of the Act. Section 8(d) of the Act expressly imposes on each party to a contract an obligation to refrain from modifying the contract without complying with the notice and waiting requirements set forth in that section. Although the Respondent gave the Union notice of a proposed change, the Respondent does not contend here that it complied in full with Section 8(d) of the Act.

The Respondent's argument that it did not refuse to bargain about the change in rates because it did, in fact, meet with the Union and discuss such change until an impasse in bargaining was reached presupposes that the Union had a duty to bargain about such change and a duty to reach an agreement to modify the contract, but Section 8(d) of the Act also expressly provides that the duties imposed by that section are not to be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract of fixed term "if such modification is to become effective before such terms and conditions can be reopened under the provisions of the

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[16] *N.L.R.B. v. C & C Plywood Corp.*, 385 U.S. 421; *Office & Professional Employees International Union, Local 525 v. N.L.R.B.*, 419 F.2d 314 (C.A.D.C.); *Bastian Blessing Division of Golconda Corporation*, 194 NLRB No. 95.

contract," here not earlier than 60 days before the expiration of the 1970-73 agreement. Where there is no duty to bargain, and where there is no right unilaterally to modify a contract during its term, an impasse occasioned by a refusal of one party to modify an agreement does not leave the proposer of modification free to make the change unilaterally.[17] Were it otherwise, there could be no binding force in any contract. Even if, to the Respondent's proposed alteration, the Union countered with an offer of a smaller change, such counteroffer would be conditioned on acceptance, and would not, before acceptance, extinguish the Respondent's duty to maintain the terms of the contract in force until the terminal date thereof. A contract can effectively be modified only by mutual consent.

I conclude and find, therefore, that Respondent's act of unilaterally modifying its agreement with the Union with respect to wage rates and fringe benefits of employees in the precooked foods department constituted a refusal to bargain within the meaning of Section 8(a)(5) and (1) of the Act.

Upon the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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[17] *C & S Industries, Inc.*, 158 NLRB 454; *Kinnard Trucking Company, Inc.*, 152 NLRB 449.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive collective-bargaining representative of all the employees in the following appropriate unit:

> All employees in Respondent's sausage and precooked foods departments, exclusive of Operating Engineers, Teamsters, office and clerical workers, nonworking foremen, and supervisors as defined in the Act.

4. By unilaterally changing the wage rates and fringe benefits established by a collective-bargaining agreement between the Respondent and the Union effective October 1, 1970, for a three-year term, and by failing to comply with the provisions of Section 8(d) of the Act, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

5. By the conduct described in Section 4 above, Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend an order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that Respondent cease and desist from making any changes in the terms and conditions of any current collective-bargaining agreement between the Respondent and the Union without first reaching agreement with the Union concerning such changes. With respect to the affirmative action, I shall recommend and order that the Respondent, upon request, revoke its unilaterally instituted wage and fringe benefit plan for the employees in its precooked foods department and restore the original contract rates of pay and fringe benefits. It will also be necessary that the Respondent restore the situation to that which existed prior to the unilateral change. This will necessitate that the Respondent make whole all affected employees for any loss they have suffered by reason of the unlawful unilateral reduction in wage rates and fringe benefits from the date of the institution of such unilateral change on June 28, 1971, until the first of the following events occurs: (1) Rescission by Respondent of its unilaterally instituted wage and fringe benefit plan and the restoration of the original rates paid prior to the May 28, 1971, layoff; (2) the expiration of the Union's Independent Sausage Kitchen Contract in 1973; or (3) the effective date of any modifi-

cation of that contract as to rates of pay and fringe benefits which may be reached as a result of negotiations between the Respondent and the Union. I shall further recommend that the backpay be computed on a quarterly basis in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289, including interest on the sums due computed in accordance with the Board's decision in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the foregoing findings of fact and conclusions of law, upon the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[18]

Respondent, Urban N. Patman, Inc., Los Angeles, California, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Unilaterally instituting changes in the terms or conditions of an existing collective-bargaining agreement;

(b) Failing or refusing to bargain collectively with the Union in the manner required by Section 8(d) of the Act;

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[18]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) In any other like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request of the Union, rescind any unilaterally instituted plan of wage rates and fringe benefits for employees in the precooked foods department and restore the rates and fringe benefits prescribed by the current collective-bargaining agreement between the Union and the Respondent.

(b) Make whole all employees in the precooked foods department of the Respondent in Los Angeles, California, for any loss of pay or fringe benefits which they may have suffered as a result of the Respondent's unilaterally instituted changes in the terms of the existing collective-bargaining agreement by paying them each a sum of money computed in the manner described in the section above entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records and other records necessary to analyze the amounts of backpay due the employees pursuant hereto.

(d) Post at its plant in Los Angeles, California, copies of the attached notice marked "Appendix A."[19]

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[19]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice

Copies of said notice, to be furnished by the Regional Director for Region 21, shall, after having been duly signed by an authorized representative of the Respondent, be posted by it immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify said Regional Director, in writing, within 20 days from the date of receipt of this Decision of what steps the Respondent has taken to comply herewith.[20]

Dated:

/s/ James R. Hemingway
James R. Hemingway
Trial Examiner

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reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[20]In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provisions shall be modified to read: "Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX A.

Notice to
Employees

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

TO ALL EMPLOYEES IN THE PRECOOKED FOODS DEPARTMENT:

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the Act, as amended, we hereby notify our employees in the precooked foods department that:

WE WILL NOT modify or alter the terms and conditions of employment established in a collective-bargaining agreement with your chosen bargaining representative unless your bargaining representative mutually agrees to a modification or alteration of such terms and conditions of employment.

WE WILL, upon request, bargain collectively with PROVISION HOUSE WORKERS UNION LOCAL NO. 274, AFL-CIO, upon any modifications or alterations of the terms and conditions of employment established by our existing collective-bargaining agreement or by any renewal thereof.

WE WILL, upon request of said Union, revoke the plan of reduced wage rates and fringe benefits which, pursuant to a letter to you dated June 22, 1971, we

instituted on June 28, 1971, without an agreement thereon having been reached with the Union; we will restore the wage rates and fringe benefits called for by our current collective-bargaining contract; and we will pay to each of you a sum of money equal to the difference between that which you have received since June 28, 1971, and the amount you would have received pursuant to the terms of said contract during the period between June 28, 1971, and the first of the following dates:

(1) The date of revocation of the plan for reduced wage rates and fringe benefits which was put into effect on June 28, 1971, and the simultaneous restoration of the rates and fringe benefits set forth in our existing collective-bargaining agreement with said Local 274, or (2) the date of expiration of the existing collective-bargaining agreement in 1973, or (3) the date of an agreement between this Company and said Local, modifying or altering the rates of pay and/or fringe benefits contained in our existing agreement.

URBAN N. PATMAN, INC.

.....
(Employer)

Dated ..... By .....
(Representative) (Title)

This Is an Official Notice and Must Not Be Defaced by Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 849 South Broadway, Los Angeles, California, 90014, Telephone Number: (213) 688-5206.

APPENDIX B.

Order Correcting Transcript.

Whereas the General Counsel and the Respondent have each moved to correct the transcript in certain respects, and whereas the undersigned has found errors which were not moved by either party to be corrected, some of which are obvious and some of which are in statements made by the Trial Examiner, and which the undersigned will correct on his own motion; now, therefore, the following corrections are ordered to be, and are, hereby made in the transcript of the Proceedings herein:

Page	*Line*	*Corrections*
6	9	Change *cross-section* to *crossed-out section*
12	18-19	Change the words *notification agreement* to *modification related*
68	11	Change *devious* to *previous*
69	9	After second *We* insert *are*
71	2	Change *1971* to *1970*
77	18	Change *action* to *acts* and change *were determined* to *would determine*
77	19	Delete *on* and change *dates* to *date*
77	20	Change *intent* to *intended*
77	24	Change *on* to *to*
77	25	Between *or* and *there* insert *if*
78	1	Change *to sign* to *even though unsigned*
78	3	Change *a binding thing* to *as binding.*
79	16	After *That* insert *it* and change *court* to *contract*
85	3	Insert *not* after *an*
85	4	Delete *to* at end of line
127	3	Change *Including* to *Include in*
157	3	Change *whereas* to *where, as*
158	2	Change *and not* to *in the*
158	24	Change *reply* to *rely*
161	5	Change *agreements in fractions* to *agreement infractions*

Page	*Line*	*Corrections*
161	13	Change *quarters* to *orders*
161	23	Change *NLRB 150 192* to *192 NLRB No. 150*
162	1	Change *in* to *and*
162	2	Change *underlie* to *undermine*
162	4	Change *use* to *construe*
162	17	Change *a definition* to *an exception*
163	12	Change *arbitrary* to *arbitrable*
165	9-10	Change *has even stooped to provide* to *is estopped to deny*
166	14	Change *belief* to *brief*
167	17	Change *financially* to *final and*
187	16	Change *Helbling* to *Tobin*
191	10	After *hour* insert *or*
194	23	Change *1972* to *1973*
196	15	Change *Union* to *Company*
229	16	Change *which* to *with*
231	10	After *had* insert *not*
233	13	After *TRIAL EXAMINER:* change *He found* to *After he found*
234	20	After *are* insert comma
243	22	Change *likely* to *unlikely*
244	2	After *say* insert *it is* and add *s* to *classification*
244	3	Delete *of cook*
275	13	After *That* insert *part*
275	14	After *will,* change to read: *grant the motion.*
279	6	Change *Choppers* to *Jobbers*
280	12	Change *Ken* to *Carl*
287	4	After first *had,* insert comma.
287	5	Change line to read: *them, not heard back from them; that this issue was still causing*
288	8	After *did* insert *not*
303	8	Change *Urban Patman* to *Service Packing*
306	10	Change *18* to *8*
312	23	Before *therefore,* insert *not**
313	1	Change *never* to *therefore*
313	14	Change *that* to *not*

*The General Counsel opposed Respondent's motion to make this correction. Respondent's motion is granted as in accord with the Trial Examiner's recollection.

Page	*Line*	*Corrections*
324	3	Change *he* to *I*
324	4	Change *he* to *I*
334	5	Change *negotiate* to *renegotiate*
336	16	Change *8(b)* to *(8)d*
337	14	After *MR. MILLER:* change line to read: *Will you please make a note for the record that Respondent's Counsel Tobin has approached the witness stand and has begun talking with witness during General Counsel's cross-examination.*
338	5	Change *6th* to *17th*
339	9	Change *only* to *occasionally*
357	7	Between *not* and *positive* insert *absolutely*
366	10	Change *review* to *renewal*
367	24	Change *18* to *21*
368	8	Change *18th* to *21st*
371	16	Change *negotiations* to *notification*
379	14 & 15	Transpose *I can't tell.* from line 14 to line 15, following *THE WITNESS:*
386	12	Change *and* to *an*

/s/ JAMES R. HEMINGWAY

JAMES R. HEMINGWAY

Trial Examiner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1593

PROVISION HOUSE WORKERS UNION LOCAL 274, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The memorandum of the court of appeals (Pet. App. 3) is not officially reported. The Board's decision and order (Pet. App. 4-35) are reported at 197 NLRB No. 150.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1-2) was entered on April 9, 1974. The petition for a writ of certiorari was filed on April 24, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly deferred the exercise of its unfair labor practice jurisdiction pending an effort by the parties to resolve the dispute under the grievance and arbitration procedure of their collective bargaining agreement.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pages 3 and 22 of the petition. Also relevant are the following provisions of—

1. The National Labor Relations Act, as amended (61 Stat. 137, 29 U.S.C. 151):

> Section 1. * * * Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury * * * by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working

conditions, and by restoring equality of bargaining power between employers and employees.

* * * * *

It is hereby declared to be the poiicy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce * * * by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

2. The Labor-Management Relations Act (61 Stat. 154, 29 U.S.C. 173(d)):

Section 203(d). Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. * * *

STATEMENT

A. The Board's Decision

Urban Patman, Inc. ("the Company") is engaged in the meat processing business in Los Angeles, California (Pet. App. 10). For many years, the Company's production employees have been represented by Provision House Workers Union Local 274, AFL-CIO ("the Union") (Pet. App. 10, 11, n. 3; Tr.

140-141).[1] The Company is a member of the Associated Meat Jobbers of Southern California ("the Meat Jobbers"), a multi-employer bargaining association (Pet. App. 11; Tr. 140-141). Employees engaged in the Company's fresh meat processing operation are covered by the collective bargaining agreement between the Union and the Meat Jobbers; employees in the Company's sausage-making department are covered by the collective bargaining agreement between the Union and the Independent Sausage Kitchens, another multi-employer association (Pet. App. 11-12; Tr. 68-69, 71-74, 280-281). Although the Company does not belong to the Independent Sausage Kitchens and does not participate in the negotiation of that agreement with the Union, the Company and other members of the Meat Jobbers with sausage operations have traditionally authorized the Meat Jobbers to adopt the Independent Sausage Kitchens Agreement (hereafter "the Agreement") on their behalf (*ibid.*).

In 1968, the Company started a precooked foods department on an experimental basis with two employees and a single broiler (Pet. App. 10; Tr. 180). As that operation became more profitable, new machinery was purchased, and the work complement gradually increased to a peak of 44 employees by 1971 (Pet. 3, Pet. App. 11; Tr. 180-182).[2] The

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[1] "Tr." refers to the transcript of the unfair labor practice hearing; "G.C. Exh." refers to the General Counsel's exhibits and "R. Exh." to the respondent's exhibits in that proceeding.

[2] The record does not show how many of these 44 employees were newly hired and how many were transferees from the

Company's precooked food employees were not specifically covered by the Agreement with the Union, but their wages were fixed by the Company on the basis of comparable jobs in the Agreement (Pet. 4, Pet. App. 13; Tr. 182-183, 209-210).

Negotiations between the Union and the Meat Jobbers for a new contract took place in late summer and fall of 1970 (Pet. 4-5, Pet. App. 14; Tr. 68-71, 283). Concurrent contract negotiations were also going forward between the Union and the Independent Sausage Kitchens (Tr. 281). When the Company's bargaining agent in the Meat Jobbers negotiations proposed that a special set of rates for the precooked food employees be negotiated in the Agreement between the Union and the Independent Sausage Kitchens, the Union responded that "there were now more important items on the bargaining table, and that there could be no discussion of that item at that time" (Pet. 5, Pet. App. 14; Tr. 280-283, 285-286).

In November 1970, the Union and the Independent Sausage Kitchens agreed on a 3-year contract, retroactively effective from October 1, and the Agreement was ratified by the Union's membership, including employees of the Company (Pet. 5, Pet. App. 14-15; Tr. 50, 281; G.C. Exh. 2). No special provisions were included in the Agreement for employees in precooked food (Pet. App. 12; G.C. Exh. 2; Tr. 219-220). On learning of the Agreement's ratification in December 1970, the Company retroactively granted

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Company's sausage-making operation, which was decreasing during this period (Pet. 3, Pet. App. 13; Tr. 182).

the new contract benefits to employees in both its sausage and precooked foods departments, although the Meat Jobbers had not yet signed the Agreement on the Company's behalf [3] (Pet. 5, Pet. App. 15; Tr. 133-134, 138-139, 231).

About this time, the Company began losing bids and suffering operating losses in the precooked foods department (Pet. App. 16; Tr. 227-228, 236, 191; R. Exh. 5). The Company learned that many of its competitors in the precooked foods business were paying much lower wages than it did, and that several of these competitors had contracts with the Union's parent labor organization (Pet. App. 16-17; Tr. 191-192, 226-227, 231-236). President Patman warned the Union in March 1971 that, unless he could get wage rates equal to those of his competitors, he would have to close the precooked foods department (Pet. App. 17; Tr. 233-234).

The Company and the Union then entered into negotiations on wages and fringe benefits for the precooked food employees; however, they had not reached agreement by the time of the Company's annual layoff of its employees for the month of June (Pet. App. 18-20; Tr. 14-15, 235-236, 248, 289-297). After the layoff began, the Union, on June 2, agreed to present the Company's final offer on wages and fringe benefits to the precooked food employees for ratification (Pet. App. 20-21; Tr. 297, 301-302, 355-356). Some 20 laid-off employees met with Union officials that night

[3] The Company did not authorize the signing of the Agreement until June 17, 1971 (*infra*, pp. 7-8).

and voted to reject the Company's proposal (Pet. App. 21; Tr. 38).[4]

In the following weeks, attorneys for the Company and the Union discussed ways to resolve the labor costs problem so that the Company could reopen the precooked foods department after the June layoff (Pet. App. 21-22; Tr. 303-306, 378-382). Company Attorney Simon took the position that there was no contract on the wages and fringe benefits of the precooked food employees (Pet. App. 22; Tr. 334-338). Union Attorney Richman responded that, if Simon thought he could sustain that theory, the Union would file a charge with the Board alleging that the Company had violated Section 8(a)(5) of the Act by repudiating the collective bargaining agreement. If the Regional Director ruled for the Company on the contract issue and dismissed the charge, Richman said he would accept the decision without appeal and would advise the Union that there was no contract (Pet. App. 22; Tr. 383).

The parties also discussed the possibility of submitting their dispute to arbitration as provided for in the Agreement, but this solution was ultimately rejected by the Union's attorney (Pet. App. 22; Tr. 311, 380-381). At some point in the negotiations, Company Attorney Simon authorized the Meat Jobbers to sign the Agreement on behalf of the Company,

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[4] An economic layoff earlier in the spring had reduced the work complement in the precooked foods department from about 44 to 25 employees (Pet. App. 20; Tr. 14, 248).

and the Agreement was signed on June 17, 1971 (Pet. App. 22, n. 8; Tr. 308-309; G.C. Exh. 2).[5]

By letters dated June 22, 1971, the Company advised the precooked food employees that the annual layoff would end on June 25, but that the Company could afford to reopen only with wages and fringe benefits which did not cost more than its competitors were paying. The letters then set out the wages and fringe benefits that precooked food employees would receive after June 28, which were said to equal the best terms provided by any competitor. These were the same terms that the Company had presented to the Union on June 2 and that the employees had rejected that night (Pet. 8, Pet. App. 23; Tr. 8; G.C. Exh. 3). On June 28, approximately 17 of the 19 recalled employees returned to work and received the new wages and fringe benefits provided for in the Company's letter of June 22 (Pet. App. 24; Tr. 14-15, 193).

The Union filed an unfair labor practice charge with the Board on June 28, and a complaint issued on August 31 (G.C. Exhs. 1(a) and 1(c)). The complaint was predicated on the theory that the current Agreement established the terms and conditions of employment for the Company's precooked food employees, as well as for employees in the sausage department; therefore the Company's institution of

---

[5] Simon testified that he authorized execution of the Agreement on the understanding that Union Attorney Richman would recommend arbitration of the dispute over the precooked food employees (Pet. App. 22, n. 8; Tr. 308-309).

lower wages and fringes in the precooked foods department constituted a mid-term modification of the contract in violation of Section 8(a)(5) and (1) of the Act (Pet. App. 4-5, 33-34).

The Company maintained, on the other hand, that the wages and fringe benefits of employees in precooked foods were not covered by the Agreement, and that, after bargaining with the Union unsuccessfully, it was free to institute the terms previously offered to the Union (Pet. App. 5; Tr. 334-335, 312-313). In support of its argument, the Company relied on Article IV, Section 12 of the Agreement, which provided (Pet. App. 28; G.C. Exh. 2; Tr. 312-313, 334):

> 12. In the event there are new jobs or classifications or new machines they shall be subject to immediate negotiations. * * *

The Company also urged that the Board should defer its decision until an attempt was made to resolve the dispute through arbitration under the contract grievance procedure. The grievance and arbitration provisions of the Agreement read in pertinent part (Pet. App. 5-6; G.C. Exh. 2):

> Article VI
>
> * * * * *
>
> 2. No employee covered by this Agreement shall be demoted, suspended, dismissed or otherwise disciplined without just and sufficient cause. Should any action by an Employer cause an employee covered by this Agreement to become

aggrieved, such employee shall orally or in writing make his complaint to the Union * * *.

* * * * *

4. In the event the parties are unable to resolve any dispute through the grievance procedure set forth in Section 2 hereof, either party may demand that the dispute proceed to abritration * * *.

5. The findings of the arbitrator shall be binding upon both the Union and the Employer providing, however, that the arbitrator shall not have the authority to change, alter or modify any of the terms or provisions of this Agreement.

No controversy regarding hours or wages shall be subject to arbitration hereunder and the provisions of this Article shall not in any way interfere with the right of any party to seek relief at law, in equity, or before any administrative tribunal where a controversy regarding hours or wages exists.

The Board ruled that the "essence of the dispute * * * is whether the present contract covers the precooked foods department employees," and that this issue "can best be resolved by arbitration" (Pet. App. 5). Accordingly, the Board (with one Member dissenting), following its decision in *Collyer Insulated Wire*, 192 NLRB 837, concluded that it would be appropriate to withhold its processes pending an effort by the parties to resolve the dispute under the contractual grievance and arbitration procedure (Pet. App. 7). The Board thus dismissed the complaint but retained jurisdiction "to entertain an appropriate

and timely motion for further consideration upon a proper showing that * * * (a) the dispute has not, [with] * * * reasonable promptness after the issuance of this Decision, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the dispute has been duly found by the arbitrator not to be arbitrable, or (c) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act" (*ibid.*).

B. The Decision of the Court of Appeals

The court of appeals held that "[t]he Board did not exceed its jurisdiction, nor did it abuse its discretion, in deferring exercise of that jurisdiction pending arbitration" (Pet. App. 3). The court added that, "[o]f course, the Board cannot abdicate its statutory responsibilities by inappropriate deferrals to arbitration," but concluded that "[t]he record before us raises no inference that the Board failed to perform its duties" (*ibid.*).

ARGUMENT

The decision of the court of appeals sustaining the Board's deferral to the contractual grievance and arbitration procedure is correct and not in conflict with other decisions. No issue warranting review by this Court is presented.

1. In *Collyer Insulated Wire*, 192 NLRB 837, the Board announced that, where the question whether there has been a refusal to bargain turns upon an

interpretation of the collective bargaining agreement and the agreement contains a grievance and arbitration procedure which is likely to result in a prompt and fair resolution of the dispute, it would withhold its processes pending resort by the parties to the contract procedure. However, the Board added that it would entertain a motion for further consideration on a proper showing that the dispute had not been properly settled or submitted to arbitration, or that the grievance and arbitration procedure had not been fair and regular or had reached a result that was repugnant to the Act.

Every court of appeals that has passed on the Board's policy of deferral in these circumstances[6] has approved it. See *Associated Press* v. *National Labor Relations Board*, 85 LRRM 2440, 2444, February 20, 1974 (C.A.D.C.); *I.B.E.W., Local 2188* v. *National Labor Relations Board* (*Western Electric Co.*), 85 LRRM 2576, 2578, February 28, 1974 (C.A.D.C.), petition for certiorari filed, No. 73-1788; *Enterprise Publishing Co.* v. *National Labor Relations Board*, 85 LRRM 2746, March 18, 1974 (C.A. 1); *Nabisco, Inc.* v. *National Labor Relations Board*, 479 F. 2d 770 (C.A. 2); and the Ninth Circuit's decision in this case. See also *Local*

[6] In *National Radio Co.*, 198 NLRB No. 1, 80 LRRM 1718, the Board concluded that it would effectuate the policies of the Act to defer action on an alleged violation of Section 8(a)(3) and (1) the Act pending the completion of efforts under the contract grievance and arbitration procedure to resolve the question whether the alleged discriminatee had been disciplined for "just cause." The propriety of this application of the *Collyer* policy is not presented here.

715 v. *National Labor Relations Board* (*Malrite of Wisconsin, Inc.*), 85 LRRM 2823, March 29, 1974 (C.A.D.C.). And see *William E. Arnold Co.* v. *Carpenters District Council*, No. 73-466, decided May 20, 1974, slip op., pp. 4-5.

2. The Board's decision to defer the exercise of its jurisdiction where the unfair labor practice issue turns on a contract interpretation question and the arbitral process is available and capable of resolving the dispute furthers the Act's policy of encouraging "practices fundamental to the friendly adjustment of industrial disputes" and "the practice and procedure of collective bargaining" (Section 1, *supra*, pp. 2-3). See also Section 203(d) of the Labor-Management Relations Act, *supra*, p. 3. Moreover, such a deferral policy is supported by the legislative history of the 1947 amendments to the Act.

Congress deleted from those amendments provisions which would have made it an unfair labor practice to violate the terms of a collective bargaining agreement with the explanation that, "Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42, I Leg. Hist. of the Labor-Management Relations Act 546 (GPO, 1948).[7] At the same

[7] Even the proponents of this provision commented (S. Rep. No. 105, 80th Cong., 1st Sess. 23, I Leg. Hist. of the Labor-Management Relations Act, *supra*, 429):

> It is the purpose of this bill to encourage free collective bargaining; it would not be conducive to that objective

time, Congress enacted Section 301(a) of the Labor-Management Relations Act (29 U.S.C. 185(a)), giving the district courts jurisdiction of suits for violation of contracts between an employer and a labor organization. Congress thus not only denied the Board "plenary authority to administer and enforce collective bargaining contracts," but it also established arbitrators and the courts as "the principal sources of contract interpretation." *National Labor Relations Board* v. *Strong*, 393 U.S. 357, 360-361.

Finally, the Board's *Collyer* deferral policy is a logical corollary of its long-standing policy of deferring to an outstanding arbitral award where it has resolved the pending unfair labor practice issues in a manner not repugnant to the Act, the procedure followed was fair and regular, and all parties agreed to be bound by the award. See *Spielberg Mfg. Co.*, 112 NLRB 1080. The Board's post-award deferral policy has been noted with approval by this Court. See *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 271; *Smith* v. *Evening News Assn*, 371 U.S. 195, 198, n. 6; *National Labor Relations Board* v. *Plasterers' Union*,

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if the Board became the forum for trying day-to-day grievances or if in the guise of unfair labor practice cases it entertained damage actions arising out of breach of contract. Hence the committee anticipates that the Board will develop by rules and regulations a policy of entertaining under these provisions only such cases alleging violation of contract as cannot be settled by resort to the machinery established by the contract itself, voluntary arbitration, or if necessary by litigation in court. Any other course would engulf the Board with a vast number of petty cases that could best be settled by other means * * *.

Local 79, 404 U.S. 116, 136-137. See also *National Labor Relations Board* v. *Auburn Rubber Co.*, 384 F. 2d 1 (C.A. 10); *John Klann Moving Co.* v. *National Labor Relations Board*, 411 F. 2d 261, 263 (C.A. 6), certiorari denied, 396 U.S. 833.

3. The court of appeals properly held (Pet. App. 3) that the Board was reasonable in applying its *Collyer* deferral policy here. The dispute in the present case turns on whether the Company was contractually liable to pay the precooked foods employees the wages and fringe benefits provided in the Agreement. The Agreement provides for binding arbitration. The long history of collective bargaining, the absence of anti-union animus, and the fact that the Company itself sought arbitration of the dispute support the likelihood that the contractual procedure will result in an amicable adjustment.[8]

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[8] Contrary to petitioner's contention (Pet. 39-40), the Board properly determined that the dispute here is subject to arbitration under the contract. Thus, there is no question that the Company is bound by the Agreement. Moreover, while the arbitration clause excludes a "controversy regarding hours or wages," it is at least arguable that such exclusion was not intended to encompass the "coverage" question of whether the employees in the precooked foods department fit into the job classifications set forth in the contract and are thus entitled to the wages and other benefits prescribed for those classifications, or whether their terms must be negotiated pursuant to Article IV, Section 12 of the Agreement (*supra*, p. 9). In these circumstances, there is a sufficient basis for submitting the issue to arbitration. See *United Steelworkers* v. *Warrior and Gulf Navigation Co.*, 363

4. Petitioner's other contentions are also without merit.

a. Petitioner attacks the policy enunciated in *Collyer* on the ground that the Board there engaged in rulemaking without following the rulemaking procedures of the Administrative Procedure Act (Pet. 13). But this Court has recently reaffirmed that "the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion." *National Labor Relations Board* v. *Bell Aerospace Co., Division of Textron, Inc.*, No. 72-1598, decided April 23, 1974, slip op., p. 27. Petitioner points to no prejudice it suffered from reliance on pre-*Collyer* precedent and the present case falls squarely within the rationale of *Collyer*. Petitioner's expressed concern that other litigants will be misled to their detriment or that *Collyer* will be misapplied in other contexts is appropriately left for cases that present those issues.[9]

U.S. 574, 582-583; *Gateway Coal Co.* v. *United Mine Workers*, No. 72-782, decided January 8, 1974, slip op., p. 11, n. 10. Similarly, since there is no question that the precooked food employees were part of the production unit represented by the Union, there is no substance to petitioner's further contention (Pet. 25) that the Board deferred to arbitration the determination of an appropriate unit or a statutory bargaining representative.

[9] *National Labor Relations Board* v. *Chase Mfg. Co.*, 85 LRRM 2602, February 5, 1974 (C.A. 7), cited by petitioner (Pet. 14), is distinguishable on the face of the quotation printed in the petition. The Board failed to defer in that case because there was "no claim that the company believed it had

b. Petitioner asserts that the Board's *Collyer* deferral policy constitutes an improper cession of its unfair labor practice jurisdiction (Pet. 22-28), and unduly subordinates the public's interest in enforcement of the Act to private remedies (Pet. 28-37). However, Section 10(a) of the Act empowers, but does not require, the Board to exercise its unfair labor practice jurisdiction. Accordingly, the Board has "considerable discretion to * * * decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act." *International Harvester Co.*, 138 NLRB 923, 925-926, quoted with approval in *Carey* v. *Westinghouse Co.*, *supra*, 375 U.S. at 271. See also *National Labor Relations Board* v. *Indiana and Michigan Electric Co.*, 318 U.S. 9, 18. For the reasons given (*supra*, pp. 13-14), the Board's decision to withhold its processes pending an effort by the parties to resolve their hybrid contract-unfair labor practice question under the contract procedure which they have agreed to serves "the fundamental aims of the Act." Moreover, the Board has expressly retained jurisdiction to guard against possible unfairness of the arbitration procedure or a result that is repugnant to the Act (*supra*, p. 11).

Alexander v. *Gardner-Denver Co.*, No. 72-5847, decided February 19, 1974, is not to the contrary. In

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a right under the agreement to unilaterally reduce wages"; rather, that case involved " 'Respondent's complete rejection of the principles of collective bargaining' " (85 LRRM at 2603).

Title VII of the Civil Rights Act of 1964 (78 Stat. 253), Congress chose to rely on private suits as the primary means of vindicating the rights conferred, and it indicated that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. By contrast, in the National Labor Relations Act, Congress adopted a procedure to accommodate the national policy of "encouraging the practice and procedure of collective bargaining," which empowers, but does not require, the Board to exercise its unfair labor practice jurisdiction. Congress specifically indicated a preference for arbitration as a means of resolving industrial disputes. See Section 203(d) of the Labor-Management Relations Act (*supra*, p. 3). Thus, Board deferral here is consistent with the policies of the Act and is to be distinguished from court deferral under Title VII, which this Court found to be counter to that statute's policy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COME,
Deputy Associate General Counsel,
MARION GRIFFIN,
Attorney,
National Labor Relations Board.

JUNE 1974.

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In the

Supreme Court of the United States

October Term, 1973

No. 73-1583

PROVISION HOUSE WORKERS' UNION LOCAL 274, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

URBAN PATMAN, INC.,

Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Intervenor Urban Patman, Inc. in Opposition.

CARL M. GOULD,
STANLEY E. TOBIN,
DAVID C. GRANT,
445 South Figueroa, 34th Floor
Los Angeles, Calif. 90017,
Attorneys for Intervenor.

GILL, FATHER & HURRELL,
Of Counsel.

Parker & Co., Law Printers, Los Angeles. Phone 724-6525

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1593

PROVISION HOUSE WORKERS UNION LOCAL 274, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

URBAN PATMAN, INC.,

Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Intervenor Urban Patman, Inc. in Opposition.

Opinions Below.

The opinion of the Court of Appeals for the Ninth Circuit (Pet. App. 3) is reported at 493 F. 2d 1249. The Board's decision and order is reported at 197 NLRB No. 158 (Pet. App. 4-7).

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 9, 1974. The petition for a writ of certiorari was filed on April 23, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

The overriding issue here involved relates to whether the National Labor Relations Board may, consonant with its proper exercise of discretion, initially defer to the parties' consensual processes and thereby promote a well-settled labor policy in favor of arbitration. Petitioner seeks to unduly shackle the Board via its averments that the Board is *required* to exercise its immediate jurisdiction in every case which involves not only an alleged unfair labor practice but also an arbitrable contract dispute.

Specifically, the questions presented for review by this Court are:

1. Does substantial evidence support the court of appeals' determination that the National Labor Relations Board did not abuse its discretion in requiring the parties to settle their contractual disputes in an arbitral forum which they have consensually established, subject to the Board's subsequent review to determine whether the settlement was consistent with the policies of the National Labor Relations Act?

2. Does the Board have the discretion to require the parties to settle their contractual disputes in an arbitral forum which they have consensually established, subject to the Board's subsequent review to determine whether the settlement was consistent with the policies of the National Labor Relations Act?

Statement of the Case.

Intervenor and Real Party in Interest Urban N. Patman, Inc. (hereinafter referred to as "Patman") is a member of a multi-employer bargaining association known as Associated Meat Jobbers of Southern California (hereinafter referred to as "Meat Jobbers"). The Meat Jobbers and Petitioner have for many years negotiated collective bargaining agreements for employers and employees engaged in the fresh meat business of processing beef, lamb and pork into uncooked steaks, hamburgers, chops, and roasts (Trial Examiner's Decision, 3:4-10).

In past years, Patman's principal business was the processing of pork and some beef into sausage, bacon, ham, hot dogs, and corned beef. Petitioner represented Patman's employees engaged in this business, but it did not negotiate an agreement covering them with the Meat Jobbers or with Patman. Rather, it negotiated an agreement covering said employees with a group of independent sausage industry employers known as Independent Sausage Kitchens, who had a bargaining agent not representing Patman and other than the Meat Jobbers. Members of the Meat Jobbers who have sausage operations and who are not represented by the agent of the Independent Sausage Kitchens have normally authorized Meat Jobbers to adopt Petitioner's independent sausage industry agreement on their behalf. The Independent Sausage Kitchens' contracts for the years 1967 to 1973 covered employees classified under the following departments: sausage department,

pork processing department, lard department, and fresh meat and shipping [G.C. Exs. #7 and #2; Trial Examiner's Decision, 3:15-30].

In 1968 after Patman had unilaterally researched the market potential for precooked foods, it initiated a precooked foods department on a small scale (two employees and a single boiler). Said department was started on a trial basis only to determine the feasibility of entering the precooked foods market [Tr. 181: 2-5].

Because of the nascent and embryonic nature of the precooked food operations, no meaningful bilateral establishment of job definitions and rates could be achieved by negotiations. Thus, until the time when the operations were sufficiently solidified to permit the establishment of negotiated permanent rates and employment conditions, Patman was compelled to find, unilaterally, some temporary basis for establishing compensation rates for the employees in the precooked foods department [Tr. 182:16 to 184:3].

It was clear that the new and experimental precooked foods operations and procedures were materially different and distinct from the prior operations engaged in by Patman [Tr. 184:2-15; 219:15-16, 18-19; 220:1]. Patman was progressing from a partially automated and fully manual sausage, boning and corning operation, and venturing into a wholly automated precooked foods operation. The operations were further distinguished by the differences in resultant end products, and by the lesser skills [Tr. 183:9; 182:25], physical effort [Tr. 185:1-8], and absence of specific functions which earmarked the precooked foods operation [Tr. 201:7-14; 205:10-23; 206:14-25; 207:11-12; 208:19 to 209:3; 184:9-15].

Because the precooked foods operation involved cooking functions, it was more akin to the sausage operations than to the carving and sale of raw beef. Accordingly, Patman generally applied the sausage industry agreement to the precooked foods employees. As to wages, Patman unilaterally paid to the precooked foods employees the rates prescribed in the sausage industry agreement for those jobs thereunder which were most analogous to the functions in the precooked foods operation. For jobs in the precooked foods department that had no equivalent in the sausage department, such as quality control inspection and packing and boxing of precooked foods, rates were unilaterally set by Patman by assigning bracket numbers to those jobs and paying the rate for such bracket as was listed in the sausage contract [Tr. 200:2 to 209:1].

During 1969 and 1970, while Patman's sausage business declined, the precooked foods operation progressively increased. By 1971, approximately only 13 employees worked in the sausage department. On the other hand, the precooked foods department had expanded (from 20 employees in 1968) to a point where, at peak in 1971, 44 employees worked there. At a substantial cost, Patman installed in the precooked foods department a mechanical system with an increased capacity [Tr. 175:6 to 176:2; 181:5 to 182:14].

It soon became apparent that the precooked foods department was developing out of its experimental stage and was proving to be potentially the sole affirmative source of Patman's survival. Accordingly, it became essential for Patman to establish mutually agreeable contract rates on a permanent basis, rather

than seek to survive on experimental rates which were becoming increasingly unsatisfactory, and which carried the continuing risk that because of their prolonged maintenance, they might be considered something more than temporary by the Union. Further, because Patman's competitors in the precooked food business were able to underbid it due to their lower wage rates, it became increasingly essential to negotiate new and more competitive rates [Tr. 103:19 to 104:4; 285:20-25].

During negotiations in August, September and October of 1970 between Petitioner and the Meat Jobbers for a new meat cutters' contract, Patman's attorney, aware of the lower wage rates paid by Patman's precooked foods competitors, requested the Petitioner's representatives to consider and negotiate separate rates for the employees in the precooked foods department. He was told, however, that because there were more important items on the bargaining table, there would be no discussion of that matter either now or in the future [Tr. 286:1-14].

Petitioner and the Independent Sausage Kitchens reached agreement on a new contract in November 1970, and Petitioner's membership, which included employees of Patman, ratified the agreement on November 28, 1970 [G.C. Ex. #2; Tr. 50:4-8].

Because Petitioner would not agree to bargain concerning the coverage and treatment of the precooked foods employees, it was incumbent upon Patman to either maintain the preexisting practice of paying wages and benefits comparable to the sausage industry agreement, or to initiate a wholly new schedule of wages, rates and benefits. For lack of a better choice and to avoid potential further strife with Petitioner, Patman

judiciously decided to follow generally the rates, wages and benefits prescribed in the 1970 sausage industry agreement and to apply where possible said provisions to the precooked foods operation. Patman followed this course notwithstanding that at the time it was neither a party to nor bound by the 1970 agreement. Additionally, in applying these equivalency rates, Patman never intended to agree to establish these rates as binding contract rates [Tr. 183:20 to 184:3; 197:13-14].

Patman persisted in seeking to have Petitioner meet with it to arrive at a mutually-established meaningful compensation package covering the new and mushrooming operation. During November 1970, Mr. Urban Patman (the President of Patman) telephoned a representative of Petitioner and told him he had a tremendous problem and wished to discuss it. The representative told Mr. Patman he would get in touch with him. When he did not do so, Mr. Patman unsuccessfully attempted on five occasions to reach him (Trial Examiner's Decision, 5:9-17).

Later, at two informal meetings between Mr. Patman and the Petitioner's representatives, Mr. Patman unequivocally informed said representatives that because of the glaringly lower wages and rates paid by Patman's precooked foods competitors, it was economically impossible for Patman to exist commercially on the temporary rates then applicable to its precooked employees. Mr. Patman further informed said representatives that the $500,000 in new equipment for the precooked foods operations would have to stay idle unless he could get a formal and permanent contract equal to that of his competitors. One representative said he sympathized with Mr. Patman, but that he had no authority to alter

the sausage industry agreement [Tr. 104:5-6]. He concluded that he would contact Mr. Patman later concerning a meeting [Tr. 42:22 to 44:16; 56:14-19; 144:9 to 145:16; 44:9-25; 103:19 to 104:12].

In the interim, Patman determined that it could not compete successfully with the aforementioned competitors while paying the temporary standard sausage contract rates. With this in mind, he contacted Patman's counsel and requested him to renew once again the negotiations with Petitioner for a permanent contract covering the precooked foods employees [Tr. 341: 11-17; 287:7-11].

At various subsequent meetings between Patman's counsel and Petitioner's representatives, the parties could not agree as to the terms and coverage of the new proposed contract [Tr. 22:2 to 26:2; 105:1 to 106:13].

At a later meeting on May 8, 1970, Petitioner's representative gave Patman's attorney, as requested, copies of contracts which the Petitioner's International Union had negotiated with Patman's precooked foods competitors. Patman's attorney said he would like to study them to make a comparative analysis, that he would meet with Patman the next day, and that it was necessary that the matter be resolved quickly because Patman had to submit a work bid by June 4, 1970. Petitioner and Patman agreed to resume their meeting on June 2, 1970 [Tr. 26:12-18; 106:13-17].

Patman has an annual layoff in June. Even earlier than June, however, production had fallen off in the precooked foods department to a point where it was necessary to lay off the second and third shift employees. The first shift employees were laid off at the end of the day on Friday, May 28. Between that date and

June 2, Petitioner notified the laid-off employees on each of the shifts, 44 in number, that there would be a meeting on the night of June 2 [Tr. 17:10-28].

During the day of June 2, Patman's attorney met with Petitioner's representatives and presented a proposed permanent agreement based on rates and fringe benefits contained in the agreements of competitors. That proposal was developed as follows: Patman's counsel prepared a comparison chart showing the wages and fringe benefits contained in each of the competitive contracts, and reviewed said comparison with Mr. Patman [Tr. 294-295]. After lengthy discussions, a determination was made of the nature and level of wages and benefits which Patman could provide on a competitive basis so as to enable it to renew the precooked foods operations. Said determination provided that Patman could compete only if it was able to pay wage rates for each classification somewhere between the median and top rate paid by the competitors. While Patman could provide a fringe benefit program containing the best and most generous benefits offered by any of said competitors, said program could not include any items which were excluded from their contracts [Tr. 295 to 296].

On the evening of June 2, Petitioner's representatives met with 21 of the laid-off employees. One representative told the employees that Patman, because of competition, was desirous of operating at the rates which had been submitted to the Union that day. He told them that, if Patman could not meet the competition, it would have to close the precooked foods department. *Cook further told them that they already had an existing contract.* When the matter was put to

a vote, the employees voted against accepting Patman's proposal [Tr. 35:9 to 38:13].

On June 3, Patman's counsel spoke with counsel for Petitioner and explained Patman's problem and the employees' rejection of Patman's proposal. On that day and thereafter for a couple of weeks, they discussed various courses that the parties might take to solve Patman's problem, without which, it was believed, Patman could not reopen its precooked foods operation [Tr. 378:21 to 379:6].

Patman's attorney proposed to arbitrate the dispute. This proposal was *initially* accepted by Petitioner's counsel via his assurance to Patman's counsel that he would recommend it to Petitioner [Tr. 306:22-24; 361:5-15]. Thus, when the Executive Secretary of the Meat Jobbers called Patman's attorney to request authority to sign the 1970 sausage industry agreement and thereby ratify it on behalf of Patman, the counsel for Patman, feeling that the dispute over coverage of the precooked food employees would be resolved in arbitration [Tr. 308:23 to 309:5; 359:2-5; 309:6-7], authorized the Secretary to sign the contract. Subsequent to the signing of that contract, Petitioner's attorney retracted his earlier indication of amenability to arbitration, blithely stating that his client had not accepted it [Tr. 311:1-4; 361:22-24].

Believing that the precooked foods employees were not, in fact, covered by the applicable provisions of the sausage industry agreement, Patman's attorney thereupon drafted a letter, dated June 22, and addressed it to the precooked food employees last laid off, telling them that the annual layoff, which began on May 31 would end on June 25, but that, because

Patman was losing money in the operation, it could reopen only with employee wages and benefits which did not cost more than its competitors were paying. The letter continued by setting out the wage and fringe benefits that precooked food employees would receive after June 28. These were the same as those which had been presented to Petitioner on June 2 and had been rejected by the employees that night. The letter also informed the employees that anyone who had worked for Patman before the annual closing would receive the rate provided for employees who had worked for six months regardless of the length of time the addressees had actually worked, with only newly hired employees beginning at the "start" rate. They were informed that if they wished to work in the precooked foods department, they should report for work at 7:30 a.m. on June 28, 1971 [G.C. Ex. #3; Stip. Tr. 15:4-7, Stip. Tr. 8:9-17].

On June 28, approximately 17 of the 19 recalled employees returned to work. The remaining two vacancies were filled by calling the next seniormost employees. The wages, economic benefits and other conditions of employment outlined in the June 22 letter were instituted and were continued thereafter. They were still in effect at the date of the hearing.

In addition to arbitration, both parties explored still another method for resolving their mutual dilemma. Specifically, counsel for Petitioner suggested that he would file a charge of violation of Section 8(a)(5) and, if the Regional Director should find that there was no applicable contract and should therefore refuse to issue a complaint, he would accept this decision without appeal, and would then be able to tell Pe-

titioner there was no applicable contract [Tr. 383:5-18].

On June 24, 1971, the charge leading to the instant action was filed and investigated, alleging, *inter alia*, that said implementation of the final offer on June 28 constituted an unlawful withdrawal of recognition of the Union, and a refusal to bargain, in violation of Patman's duties under Section 8(a)(5) of the Act. However, notwithstanding the mutual intent of the parties to have this be an orchestrated case, a complaint was ironically issued.

The Board's Findings and Conclusions.

The Board found from the foregoing evidence that the dispute was arguably one of whether the contract covers the precooked food department employees, and thus properly one for deferral within the meaning of *Collyer Insulated Wire*, 192 NLRB No. 150 (1971). The Board deferred to arbitration and dismissed the complaint, retaining jurisdiction to determine whether the final arbitration award was fair and regular and not repugnant to the purposes of the Act. 197 NLRB No. 150.

ARGUMENT.

Since the opinion of the Court of Appeals is correct and there is no conflict in the circuits, there is no occasion for further review.

1. Petitioner fails to establish that the Board abused its discretion in deferring to the arbitral processes which the parties consensually established. Clearly, the Board is empowered with "considerable discretion to . . . decline to exercise its authority . . . if to do so will serve the fundamental aims of the [National Labor Relations] Act." *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964); *International Harvester Co.*, 138 NLRB 923, 925-926 (1962); see *NLRB v. Plasterers' Union, Local 79*, 404 U.S. 116, 136-137 (1971); *Smith v. Evening News Ass'n*, 371 U.S. 195, 198 n.6 (1962); *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 684 (1951); *NLRB v. Indiana & Michigan Electric Company*, 318 U.S. 9, 18-19 (1942); *Consolidated Edison Co. v. NLRB*, 305 U.S.197, 222-224 (1938); *Ramsey v. NLRB*, 327 F. 2d 784, 786-787 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964).

The Board's decision to decline to exercise jurisdiction in cases where the arbitral process is potentially available and capable of resolving the dispute is plainly in accord with the intent and wishes of Congress and nurtures a fundamental policy of the Act favoring the voluntary settlement of disputes. See *Gateway Coal Co. v. United Mine Workers of America*, ... U.S. ....., 38 L. Ed. 583, 592 (1974); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1961); *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235, 252 (1970). Section 1 of the Act specifically

underscores the importance of "encouraging practices fundamental to the friendly adjustment of industrial disputes. . . ." In addition, Section 203(d) of the Act states:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method of settling grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

See also Section 101 of the Labor Management Relations Act (29 U.S.C. § 151).

The policy of the Board to defer to an agreed upon arbitration process was initially expressed in *Spielberg Mfg. Co.*, 122 NLRB 1080 (1955). There, the Board declined to consider the merits of an employer's Section 8(a)(3) discrimination charge, and deferred to the arbitrator's award, finding:

> "[T]he proceedings appear to have been *fair and regular, all parties have agreed to be bound,* and the decision of the arbitration panel is *not clearly repugnant to the purposes and policies of the Act.* In these circumstances, we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators' award." *Id.* at 1082 (emphasis added).

In *Collyer Insulated Wire Co.*, 192 NLRB No. 150, 77 LRRM 1931 (1971), the Board logically extended its sound reasoning in *Spielberg* to situations where arbitration had not yet been resorted to, and held that where a dispute is one over the terms and meaning of the contract, in addition to involving an alleged unfair labor practice, it should be resolved pursuant to the

arbitration provisions of the contract. Factually, *Collyer* involved a company (Collyer) and a Union with a bargaining history and labor relations rapport for a period of thirty-five years. Two months after executing a collective bargaining agreement with provisions designating arbitration as the exclusive remedy for resolving contract disputes, Collyer unilaterally insituted wage raises and changed working assignments for its skilled maintenance mechanics and electricians. Collyer based its actions on the language of certain provisions in the contract; the Union objected, contending that the disputed provisions precluded any such raises. Thereafter, the Union filed a complaint with the NLRB, alleging violations of Sections 8(a)(1) and (5) of the Act. The Board dismissed the complaint, finding that (1) the parties' long and productive collective bargaining relationship, (2) the company's willingness to proceed to arbitration, and (3) the fact that the dispute involved an issue of contract interpretation, evidenced that the policies of the Act would best be accommodated by deferring to arbitration. The Board retained jurisdiction, however, to determine whether the final arbitration award was fair and regular and not repugnant to the purposes of the Act.

The propriety of requiring the parties to resort initially to their own consensually adopted processes cannot be doubted; the soundness of such a requirement is patently underscored in the instant case where it is clear that all parties recognized and acknowledged the applicable arbitration process, but resorted to filing a charge only as a means to allay discontent among the employees and to thereby sculpture an orchestrated case [Tr. 383:5-18].

Petitioner nevertheless seeks to undermine the fundamental soundness of the *Collyer* rule by characterizing it as an abdication by the Board of its express and exclusive authority.[1] Such a bold assertion is belied not only by the manifest language and intendment of the Act, but also by the very rule prescribed in *Collyer*.[2]

Petitioner also inappropriately calls upon Section 10 (a) of the Labor Management Relations Act as requiring the Board to exercise its jurisdiction in all cases, and proscribing the Board from deferring to the parties' adopted arbitration procedures. However, Section 10 (a) merely provides, in pertinent part, that:

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[1]Such a position was soundly rejected by the court of appeals in *Associated Press v. N.L.R.B.*, 492 F. 2d 662 (D.C. Cir. 1974). There, the Court noted:

> "The Board does not abdicate its responsibilities to implement the National Labor Relations Act by respecting peaceful resolution of disputes through voluntarily agreed upon administrative techniques as long as it is assured that those techniques are procedurally fair and that the resolution is not clearly inconsistent with or repugnant to the statute." *Id.* at 667.

[2]Petitioner's citation of *Templeton v. Dixie Color Printing Co.*, 441 F. 2d 1064 (5th Cir. 1971) and *Surratt v. NLRB*, 80 LRRM 2804 (5th Cir. 1972), in support of its foregoing characterization, is erroneous. These decisions are plainly inapposite to the instant proceeding in that they involved the arbitrary action of the Board, under the guise of its "blocking charge practice", of refusing to hear an *employee's* decertification petition against a Union, while that same Union had pending certain unfair labor practice charges against the employer. The Courts relied strongly on the specific and mandatory language of § 9(c)(1) (the Board "*shall* provide. . . . [and] *shall* direct an election"), and on the compelling and unique circumstances of the particular cases whereunder Unions with obviously less than majority support were permitted to capriciously stall decertification elections. Further, the Courts noted that under "normal" circumstances the Board may properly invoke the blocking charge rule, despite the specific and mandatory language of Section 9. There should be no doubt, therefore. that in light of the more permissive language of § 10 (a), the Board may in its discretion defer its jurisdiction to the voluntary processes of the parties.

> "[t]he Board is *empowered* as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. . . ." (Emphasis added).

In no fashion may this general grant of authority be construed, as Petitioner contends, to *require* the Board to exercise jurisdiction in all instances. Rather, as expressly held by the Ninth Circuit Court of Appeals, Section 10(a) merely *empowers* and does not *direct* the Board to exercise its jurisdiction. *Haleston Drug Stores v. NLRB*, 187 F. 2d 418, 421 (9th Cir. 1951). See also *NLRB v. Olaa Sugar Co.*, 242 F. 2d 714, 719 (9th Cir. 1957).

Because the Board here has, pursuant to its *Collyer* doctrine, properly retained jurisdiction to police the arbitration award in the event a proper showing is made that the arbitration procedure has not been fair and regular or that the result is repugnant to the Act (197 NLRB No. 150, at 4), it certainly has not abused the discretion with which it is empowered to further the fundamental policies of the Act.[3]

2. There is absolutely no conflict in the circuits concerning the propriety of the *Collyer* doctrine. The First, Second, and District of Columbia Circuits, as well as the Ninth Circuit in this instant dispute, have catholically affirmed the soundness of the *Collyer* doc-

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[3]An "abuse of discretion" must, at minimum, entail some arbitrary and capricious action which is unjustifiable under the circumstances. See *NLRB v. Guernsey-Muskingum Electric Co-op, Inc.* 285 F. 2d 8, 11 (6th Cir. 1960).

trine, and have accordingly sanctioned the Board's exercise of discretion thereunder. *E.g., Provision House Workers Union Local 274 v. NLRB*, 493 F. 2d 1249 (9th Cir. 1974); *Enterprise Publishing Co. v. NLRB*, 493 F. 2d 1024 (1st Cir. 1974); *Associated Press v. NLRB*, 492 F. 2d 662 (D.C. Cir. 1974); *IBEW, Local 2188 v. NLRB*, ... F. 2d ....., 85 LRRM 2576 (D.C. Cir. 1974); *Nabisco, Inc. v. NLRB*, 479 F. 2d 770 (2d Cir. 1973); see *NLRB v. Chase Manufacturing Co.*, 492 F. 2d 1300 (7th Cir. 1974).

And contrary to Petitioner's bald assertion (Pet. 14), *NLRB v. Chase Manufacturing Co., supra,* is wholly inapposite to the instant dispute, in that the Board's refusal to exercise its discretion to defer, which was upheld by the court, rested upon:

> "an unlawful course of conduct whereby Respondent [employer] intended to rid itself of the established bargaining relationships and its attendant obligations of which the contract wage rates were but a part". (492 F. 2d at 1301).

In fact, *Chase Manufacturing* is actually supportive of the Court of Appeals' decision herein, and of the propriety of the *Collyer* doctrine, in that it plainly evidences the Board's refusal to defer to arbitration where to do so would be clearly repugnant to the fundamental policies of the Act.[4]

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[4]See also *Ryder Technical Institute*, 199 NLRB No. 85, 81 LRRM 1296 (1972), wherein the Board refused to follow an arbitration award which upheld an employer's unilateral discontinuance of customary bonuses. The Board noted:

> "[W]e agree with the Trial Examiner, on the basis of the test laid down in Spielberg Manufacturing Company . . . and recently reiterated in Collyer Insulated Wire . . . that the Board is not bound by the arbitrator's award which was 'clearly repugnant to the purposes and policies of the Act.'" *Id.*, 81 LRRM at 1298 (footnote and citations omitted).

3. The Court of Appeals' decision is correct since the instant dispute is particularly appropriate for deferral to the arbitration process. In *Collyer Insulated Wire,* the Board indicated that the propriety of deferring to arbitration in future disputes should be gauged by the following general queries: (1) Does the particular dispute arise within the confines of a long and productive collective bargaining relationship; (2) Was the employer's action initiated in good faith and with no design to undermine the Union; (3) Has the employer asserted its willingness to resort to arbitration; and (4) Is the dispute one of substantive contractual interpretation and eminently well suited to resolution by arbitration? *Id.,* 77 LRRM 1936.

This instant dispute provides an affirmative answer to each of these queries and is thus manifestly appropriate for deferral. The parties before this Court have had a successful and fruitful bargaining history and rapport for a period exceeding 35 years [Tr. 230:18-19; 233:19-20; 277:10]. The numerous attempts by Patman to arrive at an amicable resolution [Tr. 42:22 to 44:16; 56:14-19; 144:9 to 145:17; 44:9-25; 103:19 to 104:12; 286:1-14; 22:2 to 26:2; 105:1 to 106:13; Trial Examiner's Decision, 5:9-17], when coupled with the mutual intent of the parties to produce an orchestrated case [Tr. 383:6-18], manifests that the parties are clearly asserting their polar claims herein in good faith, and that the dispute is wholly devoid of unlawful conduct or aggravated circumstances. The parties have agreed upon a well defined grievance arbitration procedure, which Patman has urged Petitioner to use for resolving this dispute [Tr. 306:22-24; 361:5-15]. And this dispute involves a classical problem of substantive

contract interpretation, falling thereby within the bounds of the arbitration provisions.

Petitioner nevertheless seeks to becloud the otherwise patent arbitrable nature of this dispute by characterizing it as one involving issues of representation and appropriate bargaining unit. Petitioner asserts that because the Board framed the instant dispute as "one of whether the contract covers the precooked food department employees, and not one of wages", it must be concluded that the issue is whether Petitioner even represents the group in question.

However, no one disputes that the employees in question are a part of the bargaining unit, covered by the contract and represented by Petitioner [R. 11; G.C. Ex. #2; Tr. 237-238]. Relief was sought by Petitioner, as representative of the precooked foods employees, for failure to bargain over certain unilateral changes by Intervenor in the benefits and rates to be afforded said employees. There existed no dispute whatsoever over Petitioner's standing or representation of said employees, or whether said employees in themselves constituted an appropriate bargaining unit. The sole posture of the case as presented to the Board was whether the contract with Petitioner encompassed the precooked food employees and, if so, whether Intervenor was obligated to bargain with Petitioner over changes in benefits and wage rates. Because resolution of this initial question was eminently well-suited for a seasoned arbitrator, the dispute was deferred thereto.[5]

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[5]Even in the unlikely event that this instant case should in some strained fashion be characterized as one involving an issue of representation or appropriate unit, this would not preclude the Board from exercising discretion and deferring to arbi-

Petitioner alternatively asserts that the controversy is essentially one of hours or wages under Section 5 of the arbitration clause in the sausage industry agreement, and thus inappropriate for arbitration.[6] However, the arbitrator is not being asked to establish wages and hours for these employees. Rather, the question posed is one of contract interpretation: do the employees fit into the job classifications set forth in the contract, thereby being entitled to the wages prescribed by those classifications, or must their wages be negotiated, pursuant to Article IV, paragraph 12 of the contract? Since questions of interpretation of the contract are arbitrable under the contract, the Board has only ordered the parties to do what they have already agreed to do.

Moreover, arbitration clauses should be afforded the broadest and most encompassing interpretation available. This axiom was pertinently emphasized by this Court in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-584 (1963):

> "An order to arbitrate the particular grievance should not be denied unless it may be said with

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tration if, upon subsequent review, the arbitration award properly considered such an issue. *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 270 n.7 (1964). Additionally, the Ninth Circuit has pertinentiy held that a dispute such as the instant one, over whether a collective bargaining agreement applies to a certain group of employees, "inherently requires the interpretation and application of the agreement" and is particularly well-suited for arbitration. *Lodge 1327, Int'l Ass'n of Machinists and Aerospace Workers*, 454 F. 2d 88, 92 (9th Cir. 1971), *cert. denied*, 405 U.S. 952 (1972).

[6]Article V, Section 5 provides:

> "No controversy regarding hours or wages shall be subject to arbitration hereunder and the provisions of this article shall not in any way interfere with the right of any party to seek relief at law, in equity, or before any administrative tribunal where a controversy regarding hours or wages exists."

> *positive assurance* that the arbitration clause is not susceptible of an interpretaton that covers the asserted dispute. *Doubts should be resolved in favor of coverage.*" (Emphasis added).

Exclusionary clauses of the kind relied upon by Petitioner are uniformly construed to delimit only the arbitration of claims challenging the wage structure *per se,* and do not normally circumscribe disputes concerning the lowering of wages allegedly due to employees. For example, in *Desert Coca-Cola Bottling Co. v. General Sales Drivers, etc.,* 335 F. 2d 198 (9th Cir. 1964), the Court of Appeals expressly held that a contract clause excluding disputes over wages from arbitration was inapplicable in a dispute over the failure to pay overtime wages and noted:

> "The district court broadly interpreted the word 'wages' as commensurate with 'compensation', quoting 92 C.J.S. p. 1035. But the word 'wage' can also be given a narrower definition, commensurate only with the 'wage scale'. Although hours, overtime, and vacations all can affect one's income for tax purposes, the word 'wages' in the contract might well only have been intended to mean the general wage scale. Here, the arbitration clause, paragraph (d) was broad, and the exclusion clause, on its face, uncertain, if not vague. *We cannot hold that the term is 'clear and unambiguous', or say 'with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'* " *Id.* at 201 (emphasis added).

In sum, this dispute is arguably, if not definitely, one of contract interpretation and can thus be resolved

by an arbitrator in a manner which will also resolve the unfair labor practice issues consistently with the Act. There is substantial evidence supporting the Board's and the Court of Appeals' determinations in this regard, and this case is thus wholly inappropriate for review by this Court.

Conclusion.

There is no conflict of decisions. The opinion of the Court below is correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,

CARL M. GOULD,
STANLEY E. TOBIN,
DAVID C. GRANT,
Attorneys for Intervenor
Urban Patman, Inc.

HILL, FARRER & BURRILL,
Of Counsel.